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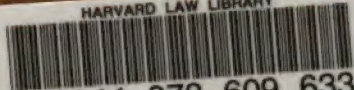
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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW-YORK

BY GEORGE F. COMSTOCK,
COUNSELLOR AT LAW.

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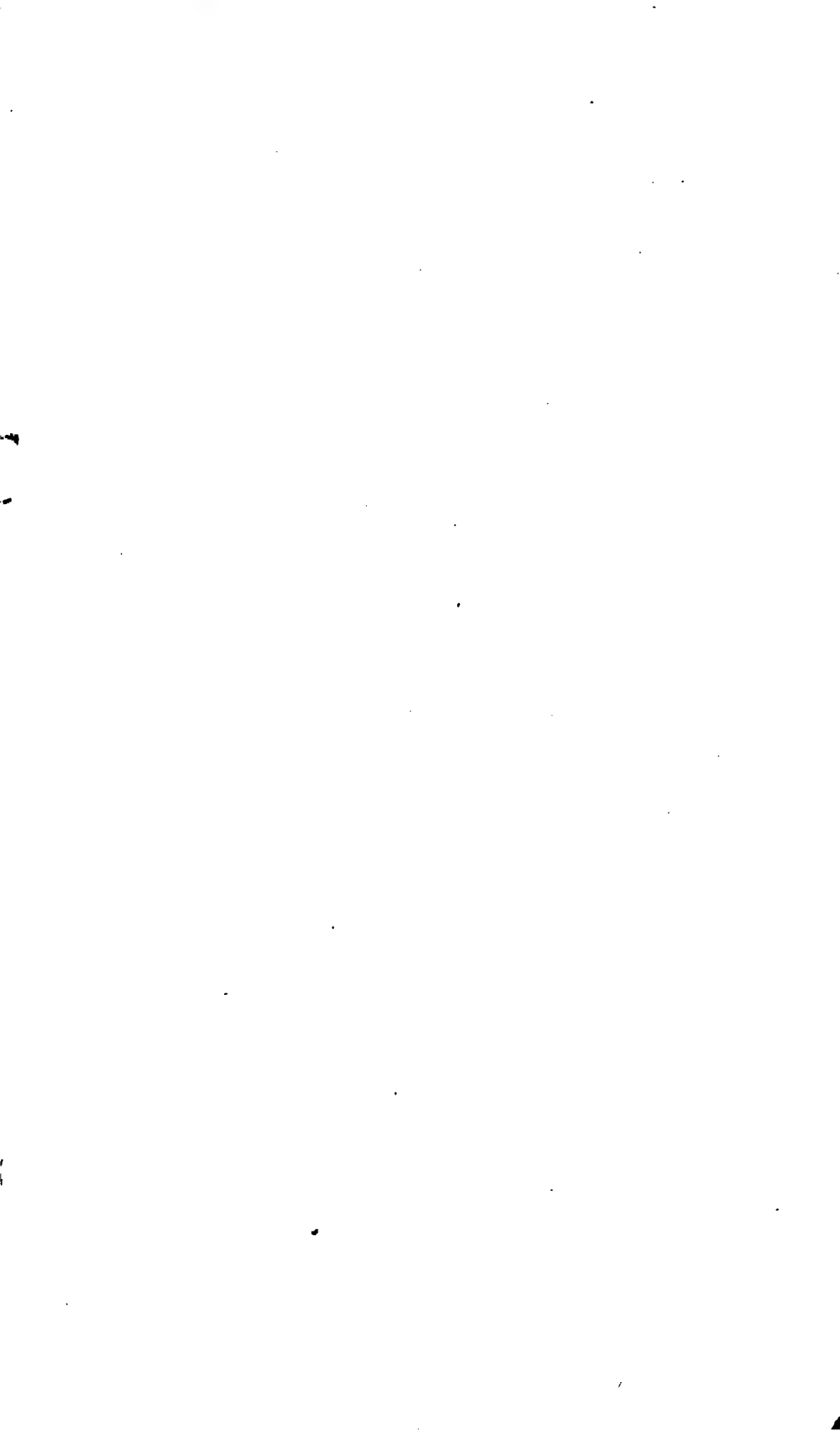
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GREENE C. BRONSON,
ADDISON GARDINER,
CHARLES H. RUGGLES, } *Judges.*

SAMUEL JONES,
WILLIAM B. WRIGHT,
THOMAS A. JOHNSON,
CHARLES GRAY, } *Judges of the Supreme Court, and
sitting in the Court of Appeals
from July 1, 1847, to January
1, 1849.*



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CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW-YORK,
IN SEPTEMBER AND NOVEMBER TERMS, 1847.

PIERCE vs. DELAMATER.

Under the new Constitution of this State, it is the right and the duty of a Judge of the Court of Appeals to take part in the determination of causes brought up for review from a subordinate court of which he was a member, and in the decision of which he took part in the court below.

THIS was a writ of error to the Supreme Court; and the judgment was affirmed by the unanimous opinion of the Judges. After the cause had been argued, and while the Judges were in consultation upon it, BRONSON J. expressed an opinion upon his right and duty to take part in the decision, which opinion he afterwards committed to writing. The case involved no other questions which seemed of sufficient importance to be reported.

BRONSON J. Having acted as Chief Justice in the determination of this cause by the Supreme Court, a question has arisen in my own mind, though it was not mentioned at the bar, concerning my right to take part in the decision of the cause by this court. If the right exists, it is of course my duty to act.

This is a question of a good deal of practical importance, as not less than four of the present members of the court have recently sat in other courts whose judgments may come here for

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review; and from the manner in which this court is constituted, one-half, at the least, of its members will always be in the like condition.

Under the Constitution of 1821, the Chancellor and Justices of the Supreme Court, though members of the court for the correction of errors, were forbidden to take part in the affirmation or reversal of their own decrees or judgments. (*Art. 5, § 1.*) This provision, with an extended application, afterwards became a part of the statute law, as follows:—"No judge of any appellate court, or of any court to which a writ of certiorari or of error shall be returnable, shall decide, or take part in the decision of any cause or matter which shall have been determined by him when sitting as a judge of any other court." (2 *R. S.* 275, § 3.) The Constitution of 1821 has been abrogated; and the only question is, whether the statute has not been virtually repealed. I think it has. The Constitution of 1846 confers the same powers on all the Judges of the Court of Appeals, and on all the Justices of the Supreme Court, with the single exception, that no judicial officer can exercise his office while under impeachment. (*Art. 6.*) As the statute denies to a particular Judge or Justice, though not under impeachment, the powers which may be exercised by his associates, it comes in conflict with the fundamental law, and must of necessity be overthrown. In the case of judicial officers deriving their authority from the Constitution, it is settled, that the legislature cannot add any disqualification to those which are found in the Constitution itself. (*Lieut. Governor's case*, 2 *Wend.* 218; *Chancellor's case*, 6 *id.* 158. And see per *Thompson, J.* and *Kent Ch., J.*, in *Yates v. The people*, 6 *John* 408, 416.) The principle is quite too plain to admit a serious doubt that it has been properly settled.

There is nothing in the nature of the thing which makes it improper for a Judge to sit in review upon his own judgments. If he is what a judge ought to be—wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to ac-

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knowledge his errors—he is then the very best man to sit in review upon his own judgments. He will have the benefit of a double discussion. If right at the first, he will be confirmed in his opinion; and if wrong, he will be quite as likely to find it out as any one else. But I need not labor to maintain a principle which has been fully established, by abrogating the disqualification in question, after it had formed a part of our fundamental law for nearly three-fourths of a century. (*Const. of 1777, Art. 32. Const. of 1821, Art. 5, §1.*)

There is another and very decisive reason in favor of the view which I entertain of this question; but as the point has not been considered by my brethren, and the matter stands firmly enough on the ground already noticed, I shall proceed no further with the discussion.

I am of opinion that it is both my right and duty to take part in reviewing the decisions of the Supreme Court while I was a member of it, and shall act accordingly.

All the other members of the Court concurred in the result of this opinion; and three of them, to wit, JEWETT, CH. J., who had been a Justice of the Supreme Court, RUGGLES, J., who had been a Circuit Judge, and JONES, J., who had been Chief Justice of the Superior Court of the city of New-York, subsequently took part in reviewing their own decisions while sitting in the several Courts which have just been mentioned.

Stief v. Hart.

STIEF vs. HART.

The judgment of the Supreme Court determining that a Sheriff holding an execution against a pledgor, may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein, affirmed, the Judges being equally divided upon the question.

After a sale by the officer in such a case, the pledgee is entitled to the possession of the property until the purchaser redeems it from the pledgee.

Whenever a power is given by statute, every thing necessary to make it effectual, or requisite to attain the end in view, is implied. *Per* JEWETT, C. J.

So when the law commands a thing to be done, it impliedly authorizes the performance of all acts necessary to the execution of the command. *Per* JEWETT, C. J.

Error from the Supreme Court. Stief brought replevin for a quantity of caps and muffs, which the defendant as Sheriff of the city and county of New York, had levied upon and taken possession of under an execution against the property of Ezra Willmarth, Jr. Issue being joined, the cause was tried at the New York Circuit in April, 1848. On the trial it was shewn that when the Sheriff took the goods, they were in possession of the plaintiff as a pledge for the payment of a note which the plaintiff held against Willmarth. The Circuit Judge charged the jury that a Sheriff holding an execution against a pledgor may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein. To this charge the plaintiff excepted. The jury found a verdict for the defendant, and the plaintiff moved in the Supreme Court for a new trial upon a bill of exceptions. That Court denied the motion and gave judgment for the defendant.

A. Taber, for Plaintiff in error.

S. Stevens, for Defendant in error.

Points for Plaintiff in error.

I. STIEF had such a property in the goods, that he could have maintained trespass against the general owner, had he

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removed them without Stief's consent, and before the lien was discharged. (10 *Wend.* 318.)

II. If trespass would lie against the general owner for interference with Stief's possessory title, it will lie against the Sheriff for the same cause, unless the Sheriff, by virtue of an execution, can acquire a greater right of control over, and a greater interest in, the property of the execution defendant than the latter himself has.

III. The 2d Revised Statutes, page 366, sec. 20, authorizes the "right and interest" of a pledgor to be sold on execution, but does not interfere with the rights of a pledgee.

In this property, the right to the possession was in Stief, and of course the possessory title of the general owner had been divested, and could not be sold; yet the Sheriff took the property from the possession of Stief, an act which the general owner himself could not do.

IV. The greater power includes the less; and if sections 20 and 23, as declared by the Supreme Court in 6th Hill, 484, give the Sheriff the power to have the property in view when sold, that power may, and therefore ought to be exercised without removing the property from the possession of the pledgee. If the Sheriff can remove, he can also enter upon the pledgee's premises to sell, and may advertise it to be sold without removal, and thus leave the rights of the pledgee undisturbed.

V. The statute does not confer upon the Sheriff power to remove the property, because,

1. At common law, the Sheriff could not remove pledged property without paying the lien; (*Story on Bailment*, 238, sec. 353;) though the "right and interest" of the pledgor could be sold on execution. (4 *Wend.* 292.)
2. The statute, secs. 20 and 23, 2 R. S. 367, does not alter, but is merely declaratory of the common law. (*Revisor's Notes*, part 3d, chap. 6, title 5, secs. 17 and 20; 17 *J. R.* 116; 14 *do.* 222.) Except that as to the power of a Sheriff to sell assigned or bailed goods, the

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decisions were conflicting. (5 J. R. 345; 4 Cowen, 469.)

8. If "personal property" in the 23d sec. includes the "right and interest" of a pledgor in the 20th sec., then the last clause of the 23d sec. must also apply to pledged property, and the Sheriff who takes it must offer it for sale in such "*lots and parcels as will bring the highest price*;" whereas pledged property must be sold in one parcel, and *cannot* be divided.

Points for Defendant in error.

I. The statute confers the right of levy upon goods pledged. (2 R. S. 290, sec. 20, 2d ed.)

II. Personal property cannot be sold unless the same be present, and within the view of those attending the sale. (2 R. S. 291, sec. 23, 2d ed.)

III. The Sheriff having the right to levy, has the right to do all that the law requires to enable him to sell. (*Burrall vs. Acker*, 23 Wend. 610; 14 J. R. 352; 15 J. R. 179.)

IV. He had the right therefore to remove the property to a place of safe deposit, and he is not a *trespasser* for so doing. (*Scrugham vs. Carter*, 12 Wend. 134; *Randall vs. Cook*, 17 Wend. 58; *Phillips vs. Cook*, 24 Wend. 395; *Waddell vs. Cook*, 2 Hill, 47, note.)

RUGGLES, J. The decision of the question presented by the exception in this case, depends upon the construction of the 20th section of 2d Revised Statutes, page 366, taken in connexion with sections 18, 19, 21 and 23.

"SEC. 18. Upon executions against the property of a defendant, the officer shall levy upon any current gold or silver coin belonging to the defendant, and shall pay and return the same as so much money collected without exposing the same for sale at auction.

"SEC. 19. Upon executions the officer may levy upon and sell any bills or other evidences of debt issued by any monied corporation, or by the Government of the United States, and

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circulated as money, which shall belong to the defendant in such execution.

"SEC. 20. When goods or chattels shall be pledged for the payment of money or the performance of any contract or agreement, the right and interest in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

"SEC. 21. No sale of any goods and chattels shall be made by virtue of any execution unless previous notice of such sale shall have been given, six days successively, by fastening up written or printed notices thereof, in three public places of the town where such sale is to be had, specifying the time and place where the same is intended to be had.

"SEC. 23. No personal property shall be exposed for sale unless the same be present and within the view of those attending such sale: it shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price."

It will be observed, on reference to the statute, that the 18th and 19th sections speak of a levy, and the 20th does not; and from this difference in language it was inferred on the argument that the officer might sell under the 20th section without making a previous levy. But it will be seen that the mode of sale is so regulated by the statute as to require the officer to have the custody and control of the property sold; and the officer is therefore justified in making a levy, because a levy is necessary to a sale in the manner directed. Whenever the law requires an act to be done, it authorizes the agent to do what is necessary to accomplish it in the mode pointed out for its performance.

The 23d section declares "that no personal property shall be exposed for sale by the Sheriff unless the same be present and within the view of those attending the sale." If this provision is applicable to cases arising under the 20th section, the Sheriff must have the power to take the goods into his

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custody; because without it, he cannot produce the goods at the sale.

It cannot be seriously urged that the officer may discharge his duty without a levy, by advertising the goods to be sold on the premises of the pledgee for the purpose of having them within view of the bidders there, while the goods may be removed at the pleasure of the pledgee, beyond the reach of the Sheriff or purchaser; and moreover, if the statute gives the Sheriff no authority to take the goods for the purpose of a sale, it gives him none to enter on the pledgee's premises for that purpose; for the sale may as well be any where else as there unless it be in connection with the power to exhibit the goods to the persons attending the sale.

In *Bakewell vs. Cook*, 6 Hill 484, the Supreme Court decided this question, holding that the 23d section applied to and regulated sales authorized by the 20th section, as well as other sales of personal property. Indeed it is impossible to give to the 23d section any other construction, unless it can be shewn that the right and interest of a pledgor in goods pledged is not "*personal property*." These words are used in the 23d section, and have a well settled meaning. They embrace not only goods, chattels, coin, bills and evidences of debt, but in their strict and more appropriate legal definition signify the right and interest of the owner or owners in these articles. "Property" is defined by Jacob, in his Law Dictionary, to be "the highest right a man can have to any thing; being used for that right which one hath in lands or tenements, goods or chattels, which no way depends on another man's courtesy." In *Morrison vs. Semple*, 6 Bin. 94, Chief Justice Tilghman said, "that property signified the right or interest which one has in lands or chattels, and that it was used in that sense by the learned and unlearned, by men of all ranks and conditions;" and in *Jackson vs. Housel*, 17 Johns. Rep. 288, Chief Justice Tilghman's definition is cited and approved by the late Chief Justice Spencer. In that case and in the case of *Wall vs. Langlands*, 14 East 370, it was held that a devise by a testator of all his "property"

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passed his whole real and personal estate, and comprehended all he was worth. The words "*general property*," and "*special property*" are constantly used in the books to denote, not the chattel itself, but the different interests which several persons may have in it. Indeed the revisers could not have selected, and the language does not afford words better adapted to apply to and embrace every thing mentioned in the 19th and 20th sections of the statute as the subjects of sale than the words "*personal property*," used in the 23d section. If the words *goods and chattels* had been used in the 23d section, they would have afforded far more ground for doubt, because they are less comprehensive in their meaning. But even then a liberal construction would make them applicable to the sales mentioned in the 19th and 20th sections, because the things pledged are in fact sold subject to the redemption of the pledge. They are used in the 21st section, which directs a six day notice of sale; and if the plaintiff in error can be supposed to have shewn that the officer may sell the defendant's interest in goods pledged without producing the goods at the sale, he has shewn by stronger reason that the sale may be made without notice; because if the words "*personal property*" do not include the thing to be sold, the words "*goods and chattels*" certainly do not: and yet no one can doubt that the Legislature intended that sales under the 20th section should be regulated by the 21st.

Before the 20th section was enacted, debtors had it in their power to place their goods beyond the reach of their creditors by pledging them for the payment of a debt not equal to their value. This was doubtless the fraud alluded to by the Revisers in their note to this section. (3 R. S. 727.) "It is submitted," say they, "that the opportunity thus given to fraud and to the injury of creditors, should be avoided." Public sales of personal property not within view of the bidders at the sale were declared void by judicial decisions on the plainest grounds of public policy before the revised statutes were passed. (*Linnencoll vs. Doe and Terhune*, 14 Johns. 222; *Sheldon vs. Soper* id. 352; *Oresson vs. Stout*, 17 Johns.

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116.) The first part of the 23d section is declaratory of the law as it was previously established in these cases. The sale of personal property without having it within the view of the bidders for the purpose of ascertaining and estimating its value, was an intolerable abuse of the process of the courts. They struck it down the moment it appeared, without waiting for a statute. The plaintiff's construction of the 20th section, would set it up again; and not only so, but would render the statute ineffectual for the prevention of the frauds alluded to by the revisers. Where there is a collusive understanding between the pledgor and the pledgee of property not having an uniform quality and value in the market, (such for instance as horses, books, pictures, &c.,) the execution creditor could have no hope of selling the goods for their value unless they were exhibited at the sale, or in some way submitted to the examination of the purchasers; and where there was no such collusion, the sale without viewing the goods would be oppressive and injurious both to the pledgor and the execution creditor. The removal or concealment of the goods by the pledgee would give him an advantage at the sale over all others, and would enable him to buy at the sale at a merely nominal price.

It may be necessary in the case of goods pledged to have them produced at the sale for the purpose of selling, in lots or parcels, according to the latter branch of the 23d section; for it may frequently happen that the sale of a part of the goods, if they are in view of the buyers, may be sufficient to satisfy the pledge; and in such case the residue should be divided and sold in the ordinary way.

The purchaser ought, moreover, to have the opportunity at the sale of complying with the terms and conditions of the pledge, and of taking possession of the property. This just advantage he loses, if the goods are not produced.

It was urged on the argument that the terms "personal property," in the 23d section, could not have been used in the sense here ascribed to them; first, because the removal of the goods by the officer interferes with the pledgee's right of possession; and secondly, because the Sheriff in taking the

pledged goods exercises over them a greater power and control than the pledgor himself could lawfully exercise.

The first answer to these suggestions has been already given. It is that the 23d section, by appropriate language, subjects the sale of pledged goods to the same regulations which prevail in other cases; and we are not at liberty to disobey the statute. The Legislature has an undoubted right to confer the authority on the officer for the purpose of enabling him to execute the writ in such manner as to prevent fraud where it exists between the pledgor and pledgee, and to protect the rights of creditors. If the pledge in this case has been made before the law was enacted, a question might arise as to its retrospective operation. But whether the contract on which the execution issued was made before or after the goods were pledged, is of no importance, because the pledgee took the goods subject to a pre-existing regulation for the benefit of the creditors of the pledgor, prior or subsequent, requiring the goods to be present at the sale. The control exercised by the officer over the property of the pledgee, in taking temporary possession of the pledged goods for the purpose of a sale, is not so great as that which is exercised by the officer in the case of partners and part owners, at common law, according to the modern decisions. In the case of partners, it is true, there is no exclusive right of possession in either one of them, as in the case of the pawnee of goods; but where one partner has exclusive possession in fact, the other is not at liberty to use force to deprive him of the advantage which that possession gives; and if violence be used for that purpose by the partner out of possession, he is answerable, civilly and criminally, for all the injury which results from it. But under an execution against the property of the partner out of possession, the officer is armed with an authority which that partner has not, namely, the authority to seize the partnership goods in the hands of the other partner, and to use force if necessary to take them into his custody; and that not merely for the temporary purpose of effecting a sale and then restoring the possession, as in the case of goods

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pledged; but the Sheriff is authorized to deliver the possession to the purchaser, thus putting it beyond the reach of him from whom he took it. (2 *Hill* 47, *Waddell vs. Cook*, 3 *Denio* 125; *Walsh vs. Adams*.) So the Sheriff may enter the premises of a stranger against his will to take the goods of the debtor which happen to be there, although the debtor himself would be a trespasser in doing so. In these cases the Sheriff is justified, because he could not otherwise satisfy the exigency of the writ, to do which he is clothed with lawful authority, and bound by his duty. When the law authorizes an act, and nothing is done but what is necessary to accomplish it, those who perform it are not trespassers. (14 *Mass. Rep.* 27, *Williams vs. Amory*.)

The prevention of frauds, and the protection of the rights of the creditors of the pawner of goods, could not have been effectually accomplished in any other way than by subjecting sales such as that in question, to the same regulations as exist in other cases of personal property. We are not to presume that the power of the officer will be oppressively exercised. The possession of the pledgee will seldom be actually disturbed; and if it be interrupted the interference will commonly lead to the satisfaction of the pledge. But if it should not, the probable injury to the pawnee of the goods is not to be compared with the evil which is likely to result from a sacrifice of the value of goods by a sale at which the purchaser cannot know the quality or value of the article he buys, or where to find it when bought.

I am in favor of affirming the judgment of the Supreme Court.

JEWETT, Ch. J. At common law goods pawned or pledged are not liable to be *taken* in execution in an action against the pawner or pledgor. (*Wilkes vs. Ferris*, 5 *John Rep.* 336; *Marsh vs. Lawrence*, 4 *Cow. R.* 461; *Badlam vs. Tucker*, 1 *Pick.* 389; *Pomroy vs. Smith*, 17, *Pick.* 85; *Story on Bail* § 353, and so the principle was understood by the revisers, of our *Revised Statutes*, 3 *R. S.* 727, note under §20. *Scott vs.*

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Scholey 8. *East* 467; *Metcalf vs. Scholey* 5. *Bos. & Pull.* 461. *Srodes vs. Caven*, 3. *Watts, R.* 258; *Watson's Sheriff* 181.)

It is only by Statute that the right and interest of the pawner or pledgor of goods and chattels, can be reached by execution against such person. 2. *R. S.* 866. § 20., enacts that "when goods or chattels shall be pledged for the payment of money, or the performance of any contract or agreement, the *right and interest* in such goods, of the person making such pledge, *may be sold* on execution against him, and the purchaser shall acquire all the right and interest of the defendant and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge."

The 23rd Sec. of this Statute declares that no *personal property* shall be exposed for sale, unless the same be present, and within the view of those attending such sale. If the case of *Bakewell vs. Ellsworth* (6 *Hill* 484) was correctly decided it is admitted, that it must govern the decision of the case at bar. It is, however, insisted here as it was there, that although the Sheriff was authorized by the 20th Sec. to sell the "right and interest" of the pledgor on execution against him, yet the Statute has not conferred any authority on him to seize or take into his possession the property in the hands of the pledgee preparatory to such sale; that the Sheriff should exercise the power to sell without taking possession of or removing the property from the possession of the pledgee; that the term *personal property* in the 23rd Sec. did not apply to or include the "*right and interest*" mentioned in the 20th Sec., and that therefore a sale could legally and properly be made by the Sheriff of such right and interest, without the property being present and within the view of the persons attending the sale.

It was admitted on the argument that if the sale of such right and interest is within the 23rd Sec., that the Sheriff could not sell unless the property was present and within the view of those attending such sale. If, therefore, the Sheriff

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has no right to take into his possession the property on making a levy, to hold until he makes a sale of such right and interest and a sale cannot take place unless the property be present at the time and place of sale, it is obvious that such sale must depend upon the mere volition of the pledgee to produce and exhibit it at the time and place of sale; an absurdity which I think ought not to be ascribed to the legislature in framing the Statute. I agree with the Supreme Court in the construction of this Statute and the course of procedure which the Sheriff, under such circumstances, is authorized and required to adopt, as stated in the case referred to.

The right of the Sheriff to take and hold the goods preparatory to a sale of such right and interest arises by necessary implication from the provisions of the statute referred to. Whenever a power is given by statute, every thing necessary to making it effectual, or requisite to attain the end, is implied. (1. *Kent's Com.* 464., 5. *Ed.*) So where the law commands a thing to be done, it authorises the performance of whatever may be necessary for executing its commands. (*Foliamb's Case* 5, *Coke* 116). I am of opinion that the judgment be affirmed with double costs. (2. *R. S.* 618, §38).

GARDINER, J. The 20th Section, 2 R. S. 367, declares that when goods or chattels shall be pledged for the payment of money, or for the performance of any contract or agreement, the *right and interest* in such goods of the person making such pledge, may be sold upon execution against him, and the purchaser shall acquire all the *right and interest* of the defendant, and shall be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge.

The 23d Section provides, that no personal property shall be exposed for sale, unless the same be present and within the view of those attending such sale: it shall be offered for sale in such lots or parcels as shall be calculated to bring the highest price.

In *Bakewell vs. Ellsworth*, 6 Hill 485, it was said by the

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Supreme Court, "That the term personal property in the 23d section is synonymous with the words right and interest in the 20th section."

Whether this is the true construction of the statute, is the sole question in this case as it was in the one cited. The import of the term personal property, and of the words right and interest in goods pledged, is certainly different. The first includes all things moveable which are the subject of property; the other, a qualified right and interest in the things themselves. The term personal property is used in this law in a restricted sense; it applies to goods and chattels, coin, bills of monied corporations, which partake to some extent of the character of coin, in a word to things which can be felt and handled. But goods and chattels and the right and interest of the pledgor in "such goods," it seems to me, are far from being identical.

It is difficult to account for the use of different terms in the 20th and 23d sections upon the hypothesis assumed by the Supreme Court.

Few men possessed a more accurate knowledge of the force and effect of legal language, than the distinguished gentlemen who revised our laws: that they used terms the legal signification and common understanding of which were different, to convey the same idea, is not probable, nor should this language be so construed, unless such construction is necessary to give effect to the statute. The term personal property was intended to include not merely goods and chattels, but the bills of monied corporations, which were of a mixed character; these last being subjected to seizure like goods and chattels, were to be sold in the same manner, and both were consequently embraced under the general term personal property in the 23d section.

To this extent the 19th and 23d sections were declaratory of the law at the time of the revision. (12 *J. R.* 220. *Ib.* 395. *J. R.* 116, 14 do. 352). The language of both is substantially copied from the decisions of our courts, introducing no new principle, and intended, as I apprehend, to be applicable

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to the same kind of property which was the acknowledged subject of seizure, of division, and manual delivery at common law. The 20th section, however, establishes a new principle, and subjects an *interest* in goods to sale which could not be reached at common law. Its phraseology as we have seen is adapted to that purpose, and of course different from that of the other sections. The Sheriff is authorised to sell, (not the goods) but the *right* and *interest* of the pledgor, and this *interest* is all that is acquired by the purchaser. The right to levy upon the bills of monied corporations expressly given in the preceding section, is omitted in the 20th, for the obvious reason, that a *right* is not the subject of a manual taking; it is also *indivisible*, and consequently cannot be sold in *parcels*, as directed by the 23d section as to the personal property therein mentioned.

Had the 20th section related to the sale of real estate, instead of a *right* and *interest* in personal property, effect might be given to its provisions without implying an authority in favor of the Sheriff to change the possession as a means of effecting a sale. As the law stood at the time of the revision, an Equity of redemption, the mortgagee being in possession, a reversion, and kindred interests in land might have been sold upon execution without any levy upon the land out of which those interests arose, and without interfering with the rightful possession of third persons. *Wood vs. Colvin.* (6 *Hill* 230).

The Revisers in their note to the 20th section, after premising that goods bailed or assigned could not be sold at the common law, remark "that no possible evil is apprehended from extending the same *principle which prevails here in relation to real estate to personal property*," (3 *R. S.* 727.) By the principle adverted to, a lessor's interest in real estate might be sold, but a lessee could not be divested of his possession as a means of accomplishing such sale. So in the case of personal property. No case has been cited, where the manual taking of goods by an officer, has been justified by virtue of an execution against one having neither the possession in fact or

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the right of present possession. The case of partners, joint tenants and tenants in common, all proceed upon the right of the co-partner, and co-tenant, to the possession as well as an interest in the goods taken. (*Phillips vs. Cook*, 2 Hill 47 note.) The possession is itself a legal right which may be transferred by sale. (8 Wend. 239; 2 Cow. 253).

The decision of the Supreme Court makes an exception in the case of a pledge under the statute to a rule otherwise universal. In the second place the decision deprives the pledgee in all cases of the possession of goods which he has acquired by a valid contract made in good faith and for a valuable consideration with the debtor, and in many instances of the whole benefit of his agreement; and this without reference to the fact, whether the debt which is to be enforced by execution was incurred prior or subsequent to the bailment. Thirdly, in the absence of fraud, it gives the officer greater interest in and control over the property, than is possessed or could be exercised by the debtor through whom he makes title, legalizing the manual taking and removal of goods, to which the former had neither the right of possession, or possession in fact. I cannot believe that an implication attended by such consequences is a necessary one. The law gives to the creditor the right and interest of the pledgor, and when it grants to the Sheriff authority to transfer that interest without removing the property from the possession of the pledgee, it gives the means of obtaining it. A sale can be made of an interest in personal as well as in real estate without a prior change of possession, and if a right to levy is implied in behalf of the officer, it ought to be qualified by the right of sale in behalf of which it is invoked. The latter is limited to the right and interest of the pledgor; let the Sheriff then seize what the law empowers him to sell, and there could be no just ground of complaint in any quarter.

Again, the reasons upon which the authority of the Sheriff at common law rests, to take exclusive possession of the goods upon execution, apply but partially to the present case. Those reasons are, first, that it is necessary for their safe keeping;

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secondly, to enable him to divide and sell them in parcels, and lastly, to make delivery to the purchasers. But according to the 20th section of this law, the purchaser is not entitled to possession of the goods; the officer cannot sell in parcels; and the property after sale, remains with the pledgee, with whom the purchaser must adjust the lien and upon whose responsibility he must rely for a delivery. It is true the goods would not always be within view at the time of sale. But they could be described with reasonable certainty, which is all that would be necessary to pass the interest of the pledgor. The same knowledge that would enable the officer to seize and remove the goods in the hands of the pledgee, would enable him to levy upon the interest to be sold, to make an inventory, and to execute a bill of sale, or give such a description that a fair estimate could be made of their value. A view would not determine the price to be paid, since the value of the pledgor's interest would depend upon the lien to which they were liable.

I admit this to be an inconvenience, but it is one which is inseparable from the nature of the interest sold: it is one to which the pledgor is exposed in making a voluntary sale of his interest, and one to which those who claim under him must also submit.

The argument from inconvenience will bear with equal force against the construction of the Supreme Court; for that gives to the lowest executive officer that the law entrusts with its process, with a view to the sale of an inconsiderable interest in a valuable property, the right to override a valid contract between the debtor and pledgee, by removing the whole property from the possession of the latter, detaining it until the day of sale; and for a reasonable time afterwards, to enable the purchaser to ascertain and pay the lien. Of what is a reasonable time the officer of course must be the judge, as there is no one to determine for him.

It makes no difference in the case supposed, whether the judgment was fraudulent or not, whether it was for five dollars or five hundred.

It seems to me that these evils are palpable; and yet if

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this be the true construction of the statute, they must have escaped the attention of the revisers, as they assure us they apprehended no possible evil from the adoption of the principle they recommended.

Upon the whole case, therefore, I am of opinion, that the judgment of the Supreme Court should be reversed.

The rights of the pledgee are as important as those of the judgment creditor, they are also prior in point of time, both should be respected, and such a construction should be given to the statute, as will enable the creditor to reach the interest of the pledgor, without essentially impairing the right of the pledgee under his contract.

GRAY, J. The property in question was delivered by Willmarth, the general owner, to the plaintiff, to secure the payment of a debt owing to the plaintiff.

Besides the delivery of the goods to him as a security for his debt, the plaintiff was authorized, by express arrangement between him and the owner, to sell the goods, and to apply the avails to the extinguishment of the debt for which they were pledged. On the delivery of the goods, the price at which they were to be accounted for to the owner, was fixed, and it was part of the arrangement between the parties, moreover, that the proceeds of the goods above the price so fixed, should go to the plaintiff, and be retained by him as his profit exclusively.

The plaintiff's right of possession in this case, was coupled with a right to sell, and an interest beyond the mere security for his debt; which, I think, distinguishes this from the ordinary case of a pledge, and gives him the exclusive possession and precludes absolutely the removal of the goods by the Sheriff. But viewing this as the ordinary case of a pledge, it is entirely clear that the statute, which has changed the common law, and authorizes the sale of the interest of the pledgor in the property pledged, does not authorize the removal of the property out of the possession of the pledgee.

The statute, section 20, 2 R. S., page 366, which authorizes

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the sale on execution of the pledgor's interest, qualifies the right which the purchaser acquires therein to the precise interest of the pledgor, and expressly secures the possession of the goods to the pledgee, until a compliance by the purchaser with the conditions of the pledge.

The provisions of the section, taken together, negative, by implication at least if not expressly, the right of the officer, or of any other person, to remove the pledge from the possession of the pledgee. At all events it contains no authority for the officer having the execution to take the goods pledged into his own possession, or to do any other act in respect thereto than to dispose of the same by sale. The Sheriff, by the levy, acquires no other right in the goods pledged than that which, at the time, remained in the pledgor, and as the pledgor clearly had not the right to the possession himself, and could not legally interfere with the possession of the pledgee, so the Sheriff, by his levy, acquired no such right.

By the common law and the adjudications of our Courts, prior to the Revised Statutes, the interest of the pledgor in property pledged, was not the subject of seizure and sale on execution. (*Story on Bailment*, sec. 353; 14 *Johns.* 222; 17 *Johns.* 116; 5 *Johns.* 335; 4 *Cow.* 461; *Revisers' Notes*, 3 *R. S.*, page 727, sec. 17.) Although in the cases cited on the argument, (4 *Wend.* 292, and 10 *Wend.* 318) property in the nature of a pledge was sold on execution, yet the question of the right to sell was not raised, nor passed upon by the Court in either case.

An actual taking and removal of the pledge, is not a necessary incident to a sale thereof by the Sheriff, or in other words, the right to sell does not imply a right to remove. The sale may be effected without an actual interference with the pledgee's possession. The Sheriff, by the 23d section of the same statute, which is an enactment declaratory of the rule as previously settled by judicial decision, requires the presence of the property at the time and place of the sale. This unquestionably gives the Sheriff authority to enter upon the premises where the property may be situated, and have the

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inspection of the property, but does not authorize, either expressly or by necessary implication, its *actual taking or removal*. The two sections together give him the right of seeing, levying upon and selling the property, but give him no right to take it out of the possession of the pledgee except upon the terms provided by the 20th section. Having the right, therefore, to visit the place where the goods may be deposited for the purpose of making a levy, he has the same right, also, on the sale subsequently, with all such persons as may attend as bidders, to enter upon the same premises to accomplish the sale. The Sheriff, and all persons accompanying him as bidders, will be protected, and are not liable as trespassers. In the case of the People vs. Hopson, (1 Denio 575) it is expressly settled that "where a levy under an execution is made upon personal property which is left in the defendant's possession, the officer may sell on the defendant's premises, and third persons may rightfully attend there as bidders." Nor is the argument that the security of the Sheriff renders an actual taking and removal necessary, well founded. It does not follow that he would be accountable to the judgment creditor for the value of the goods, should the same during the time intermediate the levy and sale be removed by the pledgee, or any other person, beyond the reach of the Sheriff. The statute not having clothed him with authority to remove the goods out of the possession of the pledgee, he will not be held accountable for their loss if that loss is not attributable to his own fault or procurement. Neither the statute, nor the security of the officer, or of the execution creditor, require that the property pledged shall be taken out of the possession of the pledgee.

The statute, withholding from the officer the right to remove the property, imposes upon him no responsibility for its safe keeping, or accountability for any waste or loss not properly chargeable to his default.

The statute, authorizing the sale of a pledge, is restrictive of common law right, and must be construed strictly. Nothing that is not expressly provided for, and given thereby, ca

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be taken by intendment or implication. It is entirely clear, from the language of the statute and the note of the revisers accompanying it, that the authority to sell the interest of the pledgor in the property pledged, was not designed to interfere with the possessory right of the pledgee. (*See Revisers' note, 8 R. S., page 727, section 117.*)

The cases (12 *Wend.* 134, *Scrugham vs. Carter*; 23 *Wend.* 610, *Burrall vs. Acker*; 24 *Wend.* 395, *Philips vs. Cook*; 17 *Wend.* 58, *Randall vs. Cook*; 2 *Hill* 47, *Note, Waddell vs. Cook*; and 4 *Hill* 161, *Birdseye vs. Ray*,) relied on as establishing the right of the Sheriff to levy and remove the property pledged from the custody of the pledgee, have no application in the case of a pledge. In the three first cases the property was copartnership property, taken and sold on execution against one of the partners, and the actions were prosecuted by the partners not parties to the execution. The fourth was the case of a sale of the mortgagor's interest in property in the possession of the mortgagor covered by a chattel mortgage, and the fifth and sixth were cases where the property sold was held by several persons jointly, and as tenants in common, and the interest of all were seized and removed for the debt of one.

In all these cases except the case of the chattel mortgage, the owners had severally the right to the possession of the entire property to the exclusion for the time being of the other owners, and the Sheriff had consequently the same possessory right, by virtue of his execution, to which the individual who was the execution debtor was entitled.

The case under consideration is entirely different. In this case there was no joint ownership, no partnership, nor any ownership in common in the property between the plaintiff, the pledgee, and Willmarth, the pledgor.

It is true that in the case of *Bakewell vs. Ellsworth*, (6 *Hill* 484,) the Supreme Court say that when the interest of the pledgor in property pledged is levied upon, the Sheriff may take the actual possession of the goods. But on looking into the case it will be seen that the question as to the She-

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riff's right to the actual possession of the goods was not raised or at all discussed, and what was said by the Court therefore in this respect, can be regarded only as an *obiter dictum*, and not as a deliberate adjudication of the point. The section which authorizes the sale of the pledgor's interest, clearly does not authorize the taking of the goods out of the possession of the pledgee, and the Sheriff in removing the goods in this case, acted without authority and became a *tort-feasor*, and judgment should have been given against him. I am of opinion, therefore, that the judgment of the Supreme Court should be reversed.

WRIGHT, J. Possession is of the essence of the contract of pledge. If the pledgee voluntarily part with the possession he loses the benefit of his security. The right of retainer until the debt is paid, or engagement fulfilled, enters into and forms an essential part of such contract. (*Story on Bailments*, §287 and cases cited; 1 *Atk.* 165, 5 *Bing. N. C.* 140; 1 *Smith's Leading Cases* 223.) The pledgor may voluntarily dispose of his interest in the pledge, but the purchaser secures no right to the possession until the terms and conditions of such pledge are complied with.

At common law goods pledged were not liable to be taken in execution in an action against the pledgor, until an extinguishment of the pledgee's title. (*Story on Bailments* §353 and cases cited.) Formerly, it seems to have been conceded by the courts of this State, where chattels were bona fide pledged or assigned in trust for the payment of debts or other specified purposes, the residuary interest of the pledgor or assignor, after the purposes of the pledge or trust were satisfied, was not a subject for sale on a *fi. fa.* Therefore, to enable the creditor of the pledgor to reach his interest the Revised Statutes provided that such interest may be sold on execution. (2 *Rev. Stat.* 367 §20; *Revisers notes* part 3d, *Chap.* 6, title 5, §17. 24.) The provision is as follows:—
“When goods or chattels shall be pledged for the payment of money, or the performance of any contract or agreement,

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the *right and interest* in such goods, of the person making such pledge, may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant, and *shall be entitled to the possession of such goods and chattels on complying with the terms and conditions of the pledge.*" The intent of the provision is two-fold: 1st, To empower the officer to sell that which it was before conceded he had no authority for selling: 2d, To vest in the purchaser the precise interest of the pledgor. The officer is to do what the pledgor himself might have done and nothing more, to vest in the purchaser his right. The sole aim of the statute is to remedy an existing and admitted evil, viz: the injury to creditors arising from an inability to reach by the process of the law the residuary interest of a pledgor or assignor. I cannot think that it contemplates, in any way, even a temporary disturbance of the pledgee's rights. The power is given to the officer to sell, not the goods and chattels themselves, but the pledgor's "right and interest" therein. He is to sell something in itself incapable of manual seizure.

The question presented in this case is, whether a Sheriff under the section of the statute above cited aided by the provisions of the 23d section following, is authorized to take corporal possession of the pledged property, and remove it from the hands and custody of the pledgee. In other words, whether the statute in securing a benefit to the creditor of the pledgor, contemplated the infringement and disturbance of the rights of the pledgee. For it is idle to assume that no injury can arise to the pledgee by compelling him, before an extinguishment of his title by the payment of his debt or otherwise, to yield up even to an officer of the law the actual possession of his pledge. The undoubted effect, in many cases, would be to jeopard or impair his security.

It is insisted, that as the 20th section authorizes the officer to sell, and the 23d section provides that "no personal property shall be exposed for sale unless the same be present and within the view of those attending such sale;" that the power to take actual possession, and remove the property from

the custody of the pledgee is necessarily implied—that the law having charged the officer with a performance of a duty, he is clothed by implication, with all the power necessary to its full discharge. In the abstract, the principle may be correct, whilst the species of power contended for, in this case, may not follow from it as a consequence. That it does not, it may be urged, 1st, That the power contended for is in derogation of a common law right, and should not be presumed; 2nd, That effect may be given to the statute, and its object fully attained, without destroying the possession of the pledgee; 3d, That the statute does not contemplate a change of the possession of the pledge until after its redemption by the purchaser. The officer is to sell, and the purchaser to acquire all the “right and interest” of the pledgor. The pledgor’s interest is transferred by the act of the officer, and the operation of the statute, to the purchaser, placing the latter in the precise relation of the pledgor to the pledgee. But as a *bona fide* pledgee would be entitled to the possession of the pledge against the pledgor and all others, until the bailment was terminated by payment, or his title extinguished in some other way, it is provided that after the sale and legal transfer of the interest of the pledgor to the purchaser, the latter shall have possession “on complying with the terms and conditions of the pledge.” The obvious meaning of the section is, that the officer may sell and the purchaser acquire the “interest” of the pledgor, but that the pledgee shall only be divested of his possession of the pledged property after a redemption by the purchaser; 4th, That it is extremely doubtful whether the provisions of the 23d section apply to the sale contemplated by the 20th section, and indeed, if the whole section be read together, it is clear that they do not. In addition to having the property present and within the view of those attending the sale, the section provides that such property “shall be offered for sale in such lots and parcels as shall be calculated to bring the highest price.” The residuary interest in goods and chattels cannot be sold in “lots and parcels.” But if the Sheriff must necessarily have the pledge in view when offered

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for sale, he may comply with the statutory direction without removing the property from the possession of the pledgee. If he can enter upon the pledgee's premises to seize and remove the goods, he can also enter to sell, and may sell without removal, thus leaving the right of the pledgee undisturbed. It is true, that by leaving the property in the possession of the pledgee, the officer would encounter the risk of having it forthcoming at the sale, but if he has no power to remove he would not be responsible, should he fail, by the act of the pledgee, to effect a sale. On the other hand, should he divest the pledgee of his possession, the effect might be to impair, if not wholly destroy, the security of the latter.

I cannot bring my mind to the conclusion that the legislature in giving to the officer the power of disposing of the pledgor's interest for the benefit of his creditors intended, in any respect, to interfere with the common law right of the pledgee to exclusively hold the possession of the property until the bailment was terminated, by a compliance with its terms and conditions. Consequently I am of the opinion that the Circuit Judge erred in charging the jury, in this case, "that where property is pledged for debt and in the possession of the pledgee, a Sheriff having an execution against the pledgor, may by virtue thereof, take the said property out of the hands of the pledgee into his own possession, and remove it, and sell the right and interest of the pledgor therein." I cannot resist the conviction, that, in this State, where vast amounts of property are held in pledge for advances made thereon, the adoption of the principle that a sheriff or constable, having an execution against the pledgor, may arbitrarily divest the pledgee of his possession, would be fraught with the most injurious consequences to the interests of commerce: and I am unwilling, without the clearest expression of legislative intention, to lend my aid to its adoption.

The judgment of the Supreme Court should be reversed, and a *venire de novo* awarded.

BRONSON and JONES, JS., were in favor of affirming the judgment.

JOHNSON, J., was for reversal.

Judgment affirmed.

 Fort v. Bard.

ABRAHAM I. FORT, *Appellant*,

vs.

WILLIAM BARD and others, *Respondents*.

An appeal will not lie from a decision of the Court of Chancery upon a question of practice addressed to the discretion of that Court.

Where a defendant in the Court of Chancery suffered the bill to be regularly taken as confessed by him, and then, upon affidavits and papers excusing his default, and shewing, as his counsel claimed, a good defence on the merits, moved that Court to set aside the default and for leave to answer, and the Chancellor denied the motion; *held*, that no appeal would lie in such a case, and the appeal brought by the defendant from such a decision, was accordingly dismissed on motion.

MOTION by the respondents to dismiss the appeal. The facts are sufficiently stated in the opinion of the Court.

J. Rhoades and S. Stevens, for the motion.

O. Clark and N. Hill, Jr., opposed.

By the Court, BRONSON, J. The appellant, who was one of the defendants in the Court of Chancery, suffered the bill to be regularly taken *pro confesso* against him; and then, on affidavits and papers which, as his counsel insist, fully excused the default, and showed a good defence on the merits, moved the Court to set aside the default, and allow him to defend the suit. The Chancellor made an order denying the motion with costs; and from that order the appeal is brought. The case of *Rowley vs. Van Benthuyzen*, (16 Wend. 869,) is a direct authority for saying, that an appeal will not lie in such a case. It was a question of mere practice, addressed to the discretion of the Chancellor; and whether he decided right or wrong is not a question for review. Although the late Court of Errors was disposed to enlarge its jurisdiction, and did not always follow its own decisions, it has never held, so far as I can learn, that an appeal would lie from an order refusing to open a regular default. On the contrary, that Court has often re-

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cognized the case of *Rowley vs. Van Benthuyssen* as laying down the rule by which it intended to be governed; and has applied it in matters of more importance than the granting or refusing motions to open defaults. (*Rogers vs. Hosack*, 18 Wend. 319; *Rogers vs. Holley*, *id.* 350.) It is true, that in *Tripp vs. Cook*, (26 Wend. 143,) one Senator expressed his disapprobation of the decision in *Rowley vs. Van Benthuyssen*; but so far as appears, no other Senator agreed with him in opinion. And though the Chancellor took occasion to say, that appeals should be allowed in every case not manifestly frivolous, it will be seen that he spoke as the officer, and in view of consequences which might result to the Court of Chancery; and not as a member of the Court of Errors.

The Court of Errors has, on several other occasions, followed the case in the 16th Wendell; but the decisions have not been reported, for the reason that the question was already settled. In *Jewett vs. The Farmers' Loan and Trust Company*, the Chancellor, on motion of the complainants, ordered the defendant's answer to be taken off the files of the Court as irregular, and that the bill be taken *pro confesso* against him; and from that order the defendant appealed. After hearing his counsel, the Court of Errors dismissed the appeal, on the ground that the point decided by the Chancellor was a question of practice, resting in discretion, and not subject to review in another Court. This was in September, 1843. Two other appeals were dismissed at the same time, and on substantially the same ground. I recollect that in another case, and on another occasion, the Court dismissed an appeal from an order resting in the discretion of the Chancellor. The opinion of the Court was written by me; but I have not been able to find it since this motion was argued, nor is the name of the case recollected. I have been furnished by the State Reporter with a note of the case of *Mumford vs. Sprague and others*, where the Court of Errors in December, 1846—its last sitting—again held the same doctrine. I have been thus particular in referring to cases, because the appellant's counsel seemed to suppose that the decision in *Rowley*

vs. Van Benthuyssen had been overruled by the Court which made it.

The matter stands as strong, upon principle, as it does upon authority. Within certain prescribed periods, a party who has been sued, either at law or in equity, has a right to appear and make his defence. It is a strict legal right, of which he cannot be deprived. But when that time has expired, and his default has been entered, the legal right is at an end; and if he wishes to be heard, he must ask it as matter of grace and favor. The motion for leave to plead or answer is addressed to the discretion of the Court, and may be granted or refused as the ends of justice seem to require. It should never be granted unless the party has a good defence on the merits, and the omission to plead or answer in due time was the result of accident or mistake, without any culpable negligence on his part. And whether the motion is granted or refused, the decision is final, so far as relates to a Court of review.

But we have been told in this case, what I have often heard when sitting in the Supreme Court on motions for writs of mandamus and certiorari to inferior Courts and officers, that if a review is refused, those Courts and officers, under color of exercising their discretion, will make arbitrary, unjust and oppressive decisions. To such arguments it was answered long ago by Van Nesa, J., "we are not to presume that a public officer will corruptly exercise the power with which he is invested for the public good; and much less ought we to found a decision upon odious and disreputable presumptions against the integrity of a judicial officer. A reasonable confidence in public officers is necessary to the very existence of civil government." And Kent, C. J., said in the same case, "a reasonable confidence must be entertained, that every Court will exercise its discretion soundly." (*Trustees of Hunting-ton vs. Nicoll*, 3 Johns. 566.) Although a wise people should be careful not to go too far in that direction, they must of necessity confide some discretionary powers to all public functionaries, executive, legislative and judicial. This results from

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the very nature of representative governments. It is impossible to set down or specify in detail what shall be done under all possible circumstances. Something must be trusted to the good sense and honest purpose of the agent. Any one who will give himself the trouble to reflect on the subject, will find that there is scarcely a public officer in the State, from the highest to the lowest, who does not exercise some powers which are beyond the reach of judicial review. And this is especially so in relation to Courts of justice. They dispose of many questions daily, where there is no appeal. And it must be so. The questions are for the most part such as cannot be fully and intelligibly presented to an appellate Court. And besides, no community could endure the army of Judges which would be necessary, and the endless litigation which would follow if every decision in relation to the mere practice and proceedings of the Court might be carried from Court to Court by appeal.

The reason assigned by the Chancellor for denying the motion was, that the defendant asked the favor of having the default opened, for the purpose of setting up as a defence a violation of the restraining law by the corporation to which the mortgages had been given, and for the foreclosure of which the bill was filed, without repaying the money which he had actually received from the company. But it is not a matter for inquiry here what considerations governed the mind of the Chancellor in denying the motion. It is enough that it was a question addressed to his discretion.

Appeal dismissed.

Corning v. McCullough.

CORNING AND HORNER vs. McCULLOUGH.

A suit against a stockholder of a corporation to charge him individually with a debt contracted by it, pursuant to a provision in the act of incorporation, is not an "action upon a statute, for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved," and therefore is not barred by the three years limitation prescribed in the statute, (2 R. S. 298, § 31,) for actions of that class.

The period of six years is the only limitation provided for suits of this description.

Where the charter of an incorporated company provides that the stockholders shall be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover his demand, such stockholders are liable in an original and primary sense, like partners or members of an unincorporated association, and their liability is not created by the statute of incorporation.

It seems that the short statute of limitations above referred to is intended only to embrace penalties and forfeitures, properly so called, and other causes of action penal in their nature, and where both the cause of action and the remedy are given by statute; but does not extend to cases where the action is partly given by the common law and partly by statute.

DEMURRER to plea. Corning and Horner sued McCullough in *assumpsit* under the provisions of the act incorporating the Rossie Galena Company. (*Stat. of 1837, p. 445.*) The 9th section of that act provides, that the stockholders of the corporation shall be jointly and severally personally liable for the payment of all debts and demands contracted by the corporation, and that any person having any demand against such corporation, may sue any stockholder or director in any Court having cognizance thereof, and recover the same with costs. The 10th section provides, that before any such suit shall be commenced judgment shall have been obtained against the corporation, and execution issued thereon, and returned unsatisfied, or that the corporation shall have been dissolved. The declaration contained the necessary averments to charge the defendant as a stockholder, personally, with a debt contracted for goods sold by the plaintiffs to the company. The defendant pleaded that the cause of action did not accrue within three years next before the commencement of the suit. To this plea the plaintiffs demurred, and the defendant joined

1	47
131	492
1	47
147	609
1	47
168	*208
168	*212
1	4
e172	*58
e172	*58

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in demurrer. The Supreme Court held the plea a good bar under 2 R. S. 298, § 31, for the reasons assigned in the case of Freeland and others vs. McCullough, (1 *Denio* 414,) and gave judgment for the defendant. The plaintiffs bring error.

N. Hill, Jr. and D. Burwell, for plaintiffs in error.

J. Van Buren, for defendant in error.

Points for plaintiffs in error:

I. The Supreme Court erred in assuming that the action in this case was founded upon the act incorporating the Rossie Galena Company, and not upon a *common law liability*, and that it was therefore an action *upon a statute*, within the meaning of 2 R. S. 297, 8, § 31.

1. Independently of the act of incorporation, the members of the company would be liable for its debts as partners, at common law. (*Collyer on Partn.* 614, 626, 635, 651, 653.)
2. The legislature, in incorporating the company, expressly refused to exempt them from their common law liability as partners. The charter virtually holds this language to the members: "You may have a corporate capacity for the convenience of transacting business, and the facility of transferring your respective interests in the joint concern; but you shall *remain* liable to the creditors of the association in the *same manner*, substantially, as though you had *not been incorporated*." (*Sess. Laws of 1837*, 445, 6, §§9, 10; 2 *Denio*, 119, 123, 4, *Harger vs. McCullough*; 2 *Hill*, 268, 269, 270, *Moss vs. Oakley*; 3 *Hill*, 188, 190, *Bailey vs. Bancker*; 26 *Wend.* 43, 51, 2, *Van Hook vs. Whitlock*; 20 *Wend.* 614, 617, *Ex parte Van Riper*.)
4. Even conceding that the action is founded partly on the act of incorporation, and partly on the common law, which we deny, still the case would not be within 2 R. S. 298, § 31. (7 *Paige* 380, 381, *Van Hook vs. Whitlock*, *per Walworth, Chancellor*.)

II. The Supreme Court have virtually decided in this case that all *statutory* remedies by action, except those which are given to the people, or a common informer, are embraced by 2 R. S. 298, § 31. This construction will extend the provision to various actions which were plainly not contemplated by the Legislature, and is therefore erroneous.

III. The provision in 2 R. S. 298, § 31, was intended to embrace only actions for *penalties* and *forfeitures*, properly so called, and other actions of the *like nature*.

1. The subject matter which the Legislature had in view, when they adopted the provisions in Art. 8d, of which the above section is a part, was actions for *penalties* and *forfeitures*. This they have expressly declared. (See 2 R. S. 291, 2, § 1, Tit. 1; 2 R. S. 295, caption of Art. 2; 2 R. S. 297, caption of Art. 3.)
2. The section was introduced mainly to provide for the case of a penalty or forfeiture given to the *party aggrieved*, which was not embraced by the preceding sections of Art. 8d. (See 2 *Greenl. Laws of N. Y.* 96; 4 *Mod.* 129; *Cro. Eliz.* 645; *Noy* 71; 3 *Leon.* 287.)
3. The word "*cause*" was substituted in this section for the word "*penalty*" used in the preceding ones, from a doubt whether a statute giving a sum of money or damages, both by way of *remedy* to the plaintiff, and *punishment* to the defendant, could rightly be called a "statute made, &c., for a *penalty*;" learned Judges having differed upon the question. (*Espinasse on Pendl Actions*, p. 6 to 8; *Hardwick's Rep.* 390, 393, *Merrick vs. The Hundred, &c.*; 1 *Wilson's Rep.* 125, 6, *Williams vs. Middleton*; 2 *Term Rep.* 154; 8 *Johns. Rep.* 345; 14 *Johns. Rep.* 255; 3 *Taml. Law Dict.* 520.)
4. By using the word "*cause*" in the unlimited sense ascribed to it by the Supreme Court, the word "*forfeiture*" is rendered entirely inoperative. But the Legislature, having expressly declared that the subject matter intended to be provided for was actions for penalties and forfeitures, the word "*cause*," being general and of doubtful

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import, is to be limited and applied accordingly. (1 *Blackst. Comm.* 60, 61; 1 *Plowden's Rep.* 203 to 206.)

5. Again, the word "*cause*," being preceded by the word "*forfeiture*," is to be understood as meaning something of the *like nature*, according to the maxim *noscitur a sociis*. Construed in this way the section will read: "All actions upon any statute made, or to be made, for any forfeiture or *like cause*," &c. (See *Broom's Legal Max.* 294, 5; 5 *Barn. & Ald.* 164, *Phillips vs. Barber*; 4 *Term Rep.* 224, 227, *Evans vs. Stevens*; 2 *Moore* 491, 495, *Clark vs. Gaskarth*; 8 *Taunt.* 431, *S. C.*)

IV. The action is embraced by that part of the statute limiting the right of suing to six years. (2 *R. S.* 295, § 18.)

1. It is within the express terms of the 4th subdivision of the above section; being an action of "*assumpsit*, or on the case, founded on a contract or liability, express or implied."
2. None of the reasons which induced the Legislature to prescribe a short period of limitation for *punitory* or *penal* actions, apply to this case. It is an action upon a demand for goods sold, and is entitled to as much favor as other actions of the same general character. (20 *Wend.* 614, *ex parte Van Riper*.)
3. If the Supreme Court are right, however, the action would be barred absolutely after *three* years, and the plaintiff would be entitled to none of the exceptions on account of disability, absence from the State, &c., which apply to other actions of *assumpsit*, and even of *tort*. (See 2 *R. S.* 296, 7, §§ 24, 26, 27; 2 *R. S.* 298, § 32.)

V. If it be doubtful, upon a view of the whole scheme of legislation on this subject, whether the *three* years limitation, or the *six*, is applicable to actions like the present, that construction should be adopted which will preserve the remedy the longest.

1. By the common law, a suitor had an *unlimited* time within which to sue, the maxim being that "a right never dies." (*Wilkinson on Lim.* 1, 2.)

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2. The "statute of limitations, being in restraint of right, is to be construed strictly;" i. e. so as to *continue* and *preserve* the right, rather than to *abridge* or *destroy* it. (14 *Johns. Rep.* 480, *per Van Ness J.*; 2 *Bos. & Pull.* 546, 7, *per Heath J.*)
8. "The better construction of a statute is always to expound it as near the rules of the common law as may be." (11 *Mod. Rep.* 150, *Arthur vs. Bokenham*; 1 *Saund. Rep.* 240; 10 *Johns. Rep.* 579, 580.)
4. "Statutes are not presumed to alter the common law *farther* or otherwise than is clearly expressed." (6 *Dane's Abr.* 589, *pl.* 20; 11 *Mod. Rep.* 150, *Arthur vs. Bokenham*; 10 *Johns. Rep.* 579, 580; *Bac. Abr. tit. "Statute"* (1) 4; *Ram. on Leg. Judgm.* 180.)

Points for defendant in error:

I. All actions upon any statute, for any cause, the benefit and suit whereof is limited to the party aggrieved, should be commenced within three years after the cause of action accrued. (2 *Rev. Stat. p.* 225, § 81, *new edition*; 1 *Rev. Laws, p.* 186, § 6.)

II. This action is brought upon the statute incorporating the Rossie Galena Company. (*Session Laws*, 1887, *p.* 445; *Bullard vs. Bell*, 1 *Mason's Rep. p.* 248; *Heacock vs. Sherman*, 14 *Wend.* 58.)

III. This action was not commenced within three years after the cause of action accrued. Therefore the plea of the statute of limitations of three years is good, and affords a bar to the recovery of the plaintiffs in this action. (*Van Hook vs. Whitlock*, 2 *Edw.* 804 *same case*, 7 *Paige*, 373; *same again*, 26 *Wendell*, 43.)

JONES, J. delivered the opinion of the Court:

Corning and Horner, the plaintiffs in error, made a sale of merchandize to the Rossie Galena Company, wherein the defendant in error was a stockholder, and after obtaining a judgment against the Company for the amount thereof, and after

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an execution, issued on the said judgment, had been returned unsatisfied, brought this action against the defendant in error as being a stockholder and member of the Company, and personally liable for the debt. The defendant pleaded in bar of the action that the cause of action did not accrue to the plaintiffs within three years next before the commencement of the suit. To this plea the plaintiffs demurred, and the Supreme Court gave judgment against them. That judgment is now before this Court for review. The question is, whether the statute limitation of three years for the commencement of actions on statutes for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of the State applies to this case, and bars the plaintiffs' action. The Revised Statutes contain a general provision limiting the time to six years within which actions of account, assumpsit, or on the case, founded on any contract or liability, express or implied, are to be commenced, as expressed in the 4th subdivision of section 18 of the 2d article of title 2d of the chapter entitled, "of actions and the times of commencing them," which the plaintiffs suppose to apply to this action. And those statutes also contain a special provision declaring that all actions upon any statute, made or to be made, for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this State, shall be commenced within three years after the offence committed, or the cause of action accrued, and not after, as expressed in section 81, in the 8d article of said title and chapter; and within this provision the defendant claims the present suit to come. To which of these classes does this action properly belong?

It was the manifest intention of the Legislature in framing the provisions of the statute for limiting the times for the commencement of actions, to separate and distinguish actions on contract, and for causes founded on good and valuable considerations, from actions on statutes for forfeitures and causes in affinity with them, and to apply to the latter class shorter periods of limitation than to the former. In accordance with

this principle, and with intent to secure to all actions for causes on meritorious consideration, the benefit and privilege of the longest time of limitation, the 4th subdivision of the 18th section is conceived in the most comprehensive terms, extending to and embracing all actions on the case, founded on any contract or liability, express or implied; and to it this action, being on the case, for the price or value of merchandize sold and delivered by the plaintiffs to the Rossie Galena Company, of which the defendant was a stockholder, on the ground of his personal liability for the debt, must belong, unless the cause of action against the defendant was in fact created or accrued to the plaintiffs by the statutes for the incorporation of the Company, or the action itself is necessarily upon the statute. Was the debt contracted to these plaintiffs by the purchase of the merchandize sold to the Company, the debt of the corporate body exclusively? or is this suit against the defendant personally, for it, strictly and technically an action on the statute of incorporation?

The ground of the action is the individual liability of the defendant to pay for merchandize sold and delivered to a company of which he was at the time a member. If that Company had been a voluntary unincorporated association of individuals, using the name of the Rossie Galena Company in its operations, his liability for its engagements would have been clear, and his defence in point of form to an action against him solely for a debt of the Company, would have been the non-joinder of his associates with him in the action. How has the act of incorporation in this case shielded the stockholders from that responsibility for the debts of the company, which, acting without it, they would have incurred? It is not a general unqualified incorporation of the company imparting to the stockholders and members composing it as a legal consequence an exemption from personal liability for the debts and engagements of the body corporate. It is a legislative grant of a special qualified corporate capacity, with adequate plenary powers for the purposes of its institution, but with the personal liability of the stockholders for the debts the company shall

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contract, and the liabilities they shall incur. The statute, at the same time that it incorporates the company, and thereby enables them to contract debts in their corporate names, provides that the stockholders who compose the company, and for whose use and benefit purchases are made and debts contracted, in their corporate name shall, notwithstanding their incorporation, be jointly and severally personally liable for the payment of all debts or demands contracted by the company, and that any person having any demand against the corporation, may sue any stockholder, director or directors, in any Court having cognizance thereof, and recover the same with costs. The Legislature thus concurrently with the creation of the body corporate, and in the same statute which creates it, enacting and providing that it shall not possess the capacity nor have the legal effect and operation which an unqualified act of incorporation would possess and have of imparting to its stockholders irresponsibility for its debts, or of contracting debts in its corporate name on the responsibility of the corporation, solely and so as to exempt its stockholders from personal liability therefor. If then the incorporation of this company does not shield or exempt its corporators and members from individual responsibility for the debts and engagements of the company, but leaves them, under the common law liability, as partners or joint debtors for those debts and engagements, must it not follow that the defendant, McCullough, he being a stockholder in the Rossie Galena Company at the time the debt of that company to these plaintiffs was contracted, became, on the consummation of the contract by the delivery of the goods to the company, liable for the payment of the debt contracted thereby? The act of incorporation affording him no protection therefrom, and not only leaving him personally liable therefor, but in express terms recognizing and affirming such liability, what defence could he make to an action charging him as a partner or joint debtor on the contract of the company? The personal liability of the stockholders to creditors under this charter, for the debts of the company, is an element of the incorporation which wholly excludes all claim of

any stockholder to treat those debts as debts of the corporate body solely, which he did not contract and is not bound to pay. The stockholders all stand under this act of incorporation on the same ground, and under the same responsibility as respects creditors, as they would if unincorporated have stood. This liability the stockholders voluntarily assumed, and it could not have been misunderstood by them. It is fully and clearly expressed in the act of incorporation. The original stockholders, by their acceptance of the charter, and subsequent purchasers in becoming members, assented and agreed to the terms and conditions of the act of incorporation. The defendant in this suit, in common with the other stockholders, by his acceptance of the charter, agreed to its terms, and especially to that feature of it so strongly marked, of the individual liability of the stockholders equally with that of the corporate body for the debts of the company. It is a liability which every stockholder must be understood to assume and take upon himself and to be under to those who deal with the company. Dealers contract with the corporation on the faith of that security for the performance of the contract. The credit they give is given, and they trust, as well to the personal liability of the stockholders, as to the responsibility of the corporation, for the fulfilment of the engagement; and each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated. When, therefore, the plaintiffs sold and delivered their merchandize to the company whereof the defendant was a stockholder, they acquired a right, of which nothing could divest them, to the liability of the defendant for the payment of the price of the goods; and the defendant incurred the obligation to answer and pay the debt thus contracted. The creditors were, it is true, required by the 10th section of the act of incorporation first to obtain judgment against the corporation (unless previously dissolved) for their demand, and to cause execution to be issued thereon, which was to be returned unsatisfied, in whole or in part, before they commenced their suit therefor against the individual stockholder on his personal liability.

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But this provision does not affect the right of the creditor to the personal liability of the stockholder for his debt, nor the obligation of the stockholder to pay the same; nor does it prevent the liability of the stockholder to the creditor from attaching and becoming perfect on the consummation of the contract of the creditor with the corporation. It simply defers the remedy by action upon that responsibility until the remedy at law against the corporation shall be exhausted, or the corporation shall have been dissolved. The intention of it is to secure the stockholder from an immediate recourse to him upon his personal liability when the corporation may be solvent and able to pay the debt, and the creditor may have an effectual remedy against the corporate body for his demand. The substance of the 9th section is, that the stockholders shall be jointly and severally personally liable for the payment of all debts contracted by the company, and that any person having a demand against the corporation may sue any stockholder therefor, and recover the same with costs; and the 10th section provides that before suit shall be commenced upon any such demand, judgment shall have been obtained against the corporation thereon, and execution issued and returned unsatisfied, in whole or in part, or the corporation shall have been dissolved. Upon these two sections taken together, the personal liability of the stockholder for the payment of the debt is immediate and absolute the moment the debt is contracted or incurred by the company; but the recourse of the creditor by suit to the stockholder upon that personal liability, is deferred until he shall have first exhausted his remedy at law against the corporation, or the corporation shall be dissolved.

The intention of the Legislature obviously was to incorporate the company with a qualified corporate capacity, vesting general corporate powers in the company, but leaving the stockholders personally liable for the debts of the corporation; and to effectuate that intention it was necessary to qualify the grant of a corporate capacity to contract debts by a provisor that the stockholders should be personally liable to creditors therefor. It was fully understood, that under a general unquali-

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fied incorporation of the company, the debts contracted by it in its corporate capacity would be the debts of the corporation and not the debts of the individuals composing the company, and that the stockholders would not be personally answerable or liable therefor. To guard against this irresponsibility of the stockholders for the debts of the company consequent upon an unqualified act of incorporation, the provision was inserted in the charter for preserving the personal liability of the stockholders; but as that provision, if permitted to have its full legal effect and operation, would expose them to the suits of creditors in the first instance, and without any previous application to the company or demand of payment therefrom, and would moreover subject the creditors themselves, when driven to their recourse to suits against the stockholders, to great and oftentimes nearly insuperable difficulties and embarrassment in the pursuit of their remedy against a numerous and widely dispersed body of stockholders, it was deemed expedient to require of the creditor first to exhaust his remedy at law for the recovery of his debt against the corporation before recourse should be had by him to the stockholders, and to enable and authorize him, when such recourse should become necessary, to take his remedy and prosecute his suit against all or any of the stockholders of the company. These elementary provisions are incorporated in the act by separate sections from the enacting clause, whereby the company is in form invested with its corporate capacity; and upon this separation of these several enactments it has been contended that the statute is to be understood and construed as intending first to incorporate the company without qualification, thereby vesting in the body corporate full powers to contract debts in its corporate name without the personal responsibility of the stockholders therefor, but exempting them therefrom, and then, by the subsequent section subjecting them to a new and qualified liability for the same; and hence concluding that the remedy on such new liability must be by an action on the statute. To this exposition of the statute I cannot accede. It is, I believe, an established rule of construction, that the

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different parts of the same act relating to the same subject, must, unless a different intent is so palpable as to admit of no question, be taken together and construed as if they were all in the same section. Upon that principle, these several sections of this act, the first incorporating the company, and the ninth and tenth qualifying the grant of corporate powers and capacity, must receive the same construction as would be given to them if they had all been incorporated in the same section of the statute. We cannot impute to the Legislature the design or intention to exempt the stockholders by the incorporation of them, from personal liability for the debts of the company, and then, by the same statute, render them personally liable for the same debts. We apprehend that the clear intent was to invest the company with a qualified corporate capacity, and not to confer upon the stockholders, either directly or indirectly, as the consequence of such incorporation or otherwise, any exemption or immunity from personal liability for the debts of the company to be contracted in its corporate name and capacity.

If this view of the act of incorporation be correct, and the personal liability of the stockholder for the debts of the company results from his connection with the company as a member of it, participating in its benefits under an incorporation so qualified as not to exempt him from such liability for its debts or to protect him therefrom, how can the remedy of the creditor upon that liability be by an action on the statute? or why must it not necessarily be by an action on the case at common law upon the liability of the stockholder for the debt of the company or copartnership, of which he is a member, and against which the incorporation of the company affords him no protection? The plaintiffs' claim is not for a forfeiture or penalty or any sum of money or thing taken from the defendant and given to them by a statute, nor upon any cause of action to which their whole and sole right or title rests upon a statutory provision entitling them thereto, but for a debt contracted by the sale by them of merchandize, whereof they were the owners, to a company of which the defendant was a

member, and wherein he had an interest as one of its stockholders.

But the sale, it is said, was to the company and not to the defendant, and the plaintiffs had full notice and well knew that they made the sale to a corporate body, and contracted the debt on its credit and responsibility. The sale, it is true, was to the company, but not on its credit exclusively, but on the faith and credit also of the personal liability of the stockholders for the debts of the company. The liability of the defendant upon which the action is grounded, is for the payment of a debt of the company incurred by the purchase of merchandize of the plaintiffs, for the use and benefit of the company, and wherein the defendant, as one of the members of the company, was interested, and for which he thereby and under the provisions of the charter of the company, became and was, concurrently with the company, from the inception of the debt, personally liable. It is virtually and in effect a liability upon a contract, and the mutual agreement of the parties; not indeed in form an express personal contract, but an agreement of equally binding obligation, consequent upon and resulting from the acts and admissions or implied assent of the parties. The company made the purchase of the goods of the plaintiffs on the terms and security authorized by the statute. The personal liability of the stockholders for the payment of the debts of the company, was one of the terms of purchase authorized by the statute. It was consequently one of the terms of the sale by the plaintiffs of their goods to the company, and constituted part of their security for the payment of the debt thereby incurred. To those terms and that security the defendant, by becoming and being at the time a stockholder of the company, gave his assent and made himself a party under and according to the provisions of the charter, and the plaintiffs, by the acceptance of the terms of sale and the delivery of the goods to the company, entitled themselves to the benefit of the personal liability of the defendant as a stockholder of the company for the payment of the debt contracted by the purchase.

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But it is objected that the personal liability of the stockholders under the statute, differs from the common law liability of copartners; the common law rule subjecting copartners to a joint responsibility, and the statute making the stockholders of the company jointly and severally liable for the debts. But that change of the common law rule of responsibility by the statute, as applied to this class of partners, cannot vary or affect the principle on which the liability rests. It is competent to the Legislature in all cases to amend, modify, and alter the rules of the common law, whenever amendments or alterations are deemed proper and expedient. Such action of the Legislature is of frequent occurrence, but such statutory amendments or modifications do not necessarily or usually abolish the rules they affect, or change the course of the common law in relation thereto; and as a general rule the pursuit of the remedy, in such cases, where the amendatory statute is silent, will be by the appropriate common law action, and not by an action on the statute. Should the Legislature provide by statute that copartners shall be liable, jointly and severally, to creditors on their contracts, and that any one or more of them might be sued upon their joint contract without joining the others in the suit, must the action for a debt accruing after the alteration of the rule of responsibility, if brought against one only of the copartners, be brought upon the statute authorizing the action against him solely as being necessarily an action on the statute, or might it not be brought in the usual form of a common lawsuit on the contract or for the debt of the copartnership? The cause of action in such case against the copartnership, would exist at common law, and the remedy against the one partner solely, though authorized and given by statute, would, I apprehend, be by suit at common law, in pursuance of the statute, and not upon the statute in the technical sense and meaning of those terms. And if the remedy against one of several copartners for a partnership debt, under a general statute providing for and authorizing the same, would be by a common law action, on the same

principle the recourse to the individual stockholder as a partner unprotected by the act of incorporation, and subjected to personal liability, might also be by a common law action on the contract of the company. Then how can this action, having for its object the recovery of a debt for goods sold to a company of which the defendant was a member, and personally liable for the payment of its debts, and which action, in no just sense of the term, partakes of the character of either forfeiture or penalty, be held an exception out of the class of actions of assumpsit and on the case to which it so naturally belongs, and to come within the description and class of actions on statute? I cannot resist the conclusion, that it is, in truth and in fact, a common law action on the case, for which the statute limitation of six years is provided, and not an action on statute subject to the shorter limitation of three years for its commencement.

But suppose it can be regarded in any sense of the term as an action on statute, is it an action for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved; and within the class of actions to which the limitation of three years is to be applied? An action, to come within the 31st section of the chapter entitled "of actions and the times of commencing them," must be an action on a statute for a forfeiture or cause, the benefit and suit whereof is limited wholly or in part to the party aggrieved. The purport of this statutory provision, especially when considered in connection with those which immediately precede it, referring also to actions on statutes, and the language in which these provisions are all expressed, indicate clearly, I think, the intention of the Legislature to have been to apply them to forfeitures and penalties, and causes of action of the like character, partaking of the nature of penal actions. The whole chapter "of actions and the times of commencing them," and all its divisions and enactments touching actions on statutes, speak that language too plainly, I think, to be misunderstood. The first title of the chapter in the first section of it defines and declares the actions included within the provisions of the chap-

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ter to be either: 1. Such as relate to real estate. 2. Those which may be brought for the recovery of any debt or demand, or for the recovery of damages only. 3. Those which may be brought *for penalties or forfeitures*. 4. Suits in equity. The 18th section of the chapter, being the first division of the second article of the second title, contains seven subdivisions. By the first of them all actions of debt founded upon any contract, obligation or liability, not under seal, nor upon a judgment or decree of a Court of Record, as therein expressed, and by the fourth subdivision all actions of account assumpsit or on the case, founded on any contract or liability, express or implied, are to be commenced within six years next after the cause of such action accrued, and not after. And I here notice the very comprehensive terms of the fourth subdivision of this section as showing it to have been purposely framed and intended to reach and comprehend all actions on the case, of every description, founded on any liability whatever; and that it must be held to extend to and embrace the action now before us, unless the same be shewn or plainly appears to be excepted and otherwise provided for as more appropriately belonging to some other class of actions. The third article of the second title of the chapter, applies to actions for penalties and forfeitures, and is entitled "of the time of commencing actions for penalties and forfeitures." It consists of three sections, being sections 29, 30 and 31 of the chapter. By the first (being section 29) all actions upon any statute for any forfeiture or penalty to the people of the State, are to be commenced within two years after the offence shall have been committed; by the second (being the 30th section) all actions upon any statute for any forfeiture or penalty given in whole or in part to any person who will prosecute for the same, are to be commenced within one year after the offence shall have been committed, and if not commenced within that time by any private citizen, then to be commenced within two years after that year ended in behalf of the people of the State; and by the third (being the 31st section) all actions upon any statute for any forfeiture or cause, the benefit and suit where-

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of is limited to the party aggrieved, or to such party and the people of the State, shall be commenced within three years after the offence committed or the cause of action accrued, and not after. Thus it is seen that the statute arranges all actions at law not relating to real estate in two classes. 1. Actions for debts, demands or damages only. 2. Actions for forfeitures and penalties. And that the 8d article of the 2d title of the chapter, which relates to the said second class of actions, namely, penalties and forfeitures, is entitled and professes to be of the time of commencing actions for penalties and forfeiture; thus shewing the leading and general intent and purpose of the Legislature to have been to confine the actions coming within this second class, to penalties and forfeitures, and to apply the short limitation of three years to such actions only.

But it is contended that the addition of the word "*cause*" to that of "*forfeiture*," in the 31st section, extends the provisions of that section to all actions for any cause, and upon any statute, whether for a forfeiture or other cause, founded upon statute liability, and the benefit whereof is limited to the plaintiff or party aggrieved. To this broad meaning of the term is opposed the narrower acceptation of it as importing "*causes*" of the same nature as those indicated by the term "*forfeiture*" with which it is so closely associated in the section—and this more restricted sense of the term strikes me as being the most rational exposition of it. That the use and application of that indefinite term in this connection, without any superadded words of restriction or explanation, has involved the section in some obscurity, the conflicting opinions of Jurists and learned Judges upon it sufficiently testify. But indefinite as it is in itself, it may, when used in connection with other terms, acquire distinctive features indicating the sense intended to be attached to it; and as used and applied in this section it must, I think, from its juxta position to the term forfeiture, from the omission in the section of the term penalty from the relation of that section to the article and chapter to which it belongs, and from the general intention of

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the Legislature, as collected from the language used in describing and designating the classes, and the character of the actions in their contemplation at the time, as those to which that article was to refer, be understood and held to apply to penalties and to such causes only as savour of forfeiture or penalty, and which, though not technically and in name penalties, are yet in substance and effect penal in their nature, and calculated and operating to affect the party exposed to them in the same or a similar manner with forfeitures and penalties.

That exposition of the meaning of the term receives countenance and support from the history of the section in which it occurs. That section was introduced into the statute of limitations of this State, on the first revision of the statute law of the State, by Jones & Varick, in 1788. On that revision the English statutes, then understood to be in force in this State, or properly applicable to us, were adapted to our system and enacted by the Legislature into the statutes of this State; and the provisions for the limitation of actions on statutes for forfeitures limited to the people, and, to common informers contained in the act for the limitation of criminal prosecutions and of actions and suits at law, then passed by the Legislature of this State, were taken from the English statute, entitled an act concerning informers of the 31st Elizabeth, ch. v, sec. 5. But that statute contained no clause or provision for the limitation of the time for the commencing of actions on statute for forfeitures or penalties, the benefit whereof was limited or given to the party aggrieved. Nor was there any statute then existing and in force in this State or in England, containing any provision for the limitation of the time of the commencement of that class of actions on statute. It was to supply this omission of the English statutes, that the clause of the 13th section of the act of 1788, providing that all actions, suits, bills or informations for any forfeiture or cause on any statute, the benefit or suit whereof, was given to the party aggrieved should be commenced within three years after the offence committed or cause of action accrued, was passed by the revisers, and

inserted in the act which was then passed by the Legislature. It was a new provision, and was the same in substance and in nearly the same words when first created, as it now exists in the section to which we have so often had occasion to advert. The provision as first adopted, has gone through the several subsequent revisions of the statute law of the State unchanged, and without any question having ever arisen upon its construction, but we believe with the generally received opinion, that the intention of it was to provide and apply a rule or time of limitation to actions on statute by the party aggrieved, for the same or similar causes with those for which actions were given to the people or to common informers, but that it was not the intention of the Legislature or the purpose of the new provision to limit the time for the commencement of actions on statutes by the party aggrieved to a shorter period than six years in other cases than those of forfeiture and penalty, and causes of the same nature therewith, and analogous thereto. When the action of the party aggrieved is for a forfeiture or penalty, it is of course upon the statute, and when for a specific sum or definite measure of indemnity or recompense, which is the form the statute sometimes gives to the remedy it provides, the action may still be upon the statute; but if such remedy be given for a wrong or injury which is actionable at common law, and the party has his election between the common law action and the statute remedy, and chooses to betake himself to his statute remedy, instead of bringing his action at common law, for the recovery of damages generally upon his proof before a jury at the trial, the short limitation of three years may be applied to him, though if he had been content with his remedy by the common law action, it would not have been applicable. But there is a class of actions and causes of action which involves statutory provisions in a greater or less degree, but which though the statute is a necessary link in the chain of title to the remedy, and they may to some intents be said to be under the statute, are not in the legal acceptance of the terms, actions upon the statute within the meaning of the limitation acts. I under-

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stand the rule to be, that to bring a case within any class of actions on statute to which the short limitation time of commencing them is applicable, the cause of action must be created or given by the statute, or the action must be upon the statute solely; that if the cause of action or remedy be partly at common law and partly by statutory provisions, the short limitations prescribed for the times of commencing action on statutes do not apply unless the cause of action be penal in its nature, or there be no other limitation provided by law adapted to the case. To this class of actions partly at common law and partly on statutory provisions, the present action, if in any sense or degree, upon statutes would belong. The liability of this defendant to these plaintiffs is neither for a penalty inflicted upon him for any offence committed by him nor for any forfeiture incurred by him, nor does it possess any element or feature of a penal character assimilating it to either forfeiture or penalty. It cannot therefore be brought within the provisions of the 31st section, and the short limitation of three years be applied to it, unless the use of the statute showing the qualified corporation it creates as evidence to connect the defendant as a stockholder, with the plaintiff's sale and delivery of the goods to the company can be held to characterize it as an action upon the statute.

But we are referred to the difference in the phraseology of this 31st section, from that of the two sections immediately preceding it, as conflicting with our exposition of the meaning of them. We are reminded that in each of the two that precede, the word penalty is added to that of forfeiture, but that in this, the word penalty is omitted, and the term "cause" left to stand in its place, whence we are asked to infer that the Legislature on the last revision intended, in accordance with the spirit of the act of 1788, as they understood it, to confine the limitation in the two sections that precede the 31st strictly to forfeitures and penalties, but to extend that of the 31st section beyond both forfeitures and penalties to other causes, and necessarily in the absence of all restriction to action on statute for any cause whatsoever. And as a further

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ground for the conclusion that such was the understanding and intention of the Legislature in the introduction and in the continuance of the new provision, it is suggested and urged, that as the Legislature on both occasions, as well in framing a general statute for the limitation of times of commencing action, as on the renewal and continuance of the same, have made use of terms in reference to this particular class of actions sufficiently broad to embrace the whole of the class, they are to be presumed to have intended to apply the rule prescribed to the whole of that class rather than to be presumed to have meant to confine it to a part only of the class. This reasoning has force when applied to a case where no reason exists for fixing a different limitation of time to some actions of that class from that which is applied to others. But is this such a case? The 31st section is one of three sections of an article entitled "of the time of commencing actions for penalties and forfeitures," and the general intention of the Legislature, as indicated by this designation of the purpose of the article, might be taken to have been to apply the rules of limitations its sections prescribe to actions for forfeitures and penalties only, and the last sections of the article relating to actions by the party aggrieved, to conform it to that general intent would in strictness be confined to the same causes of action as the two sections that precede it; but as the party aggrieved may have causes of action upon the statute against aggressors coming within the spirit, though not within the letter of the article, the word "cause" used instead of "penalty," may well be understood as being substituted for that term with intent to extend the provision to cases penal in their nature, though not in strictness and technically either penalties or forfeitures. But between these actions on statutes for the benefit of the party aggrieved, and the class to which I have before adverted as being partly on statutory provisions and partly at common law, for causes not in the nature of a forfeiture, but for the recovery of a debt or damages, and actions also for rights or remedies of a civil nature which statutes may originate or authorize, but which enable and entitle the prosecutor to re-

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cover the common law measure of damages, and not a fixed statutory recompense for the wrong or injury of the aggressor, there is a wide and marked distinction, and for this distinction there is abundant reason. It is the policy of the statute to limit the commencement of actions for forfeitures and penalties to shorter periods of time than actions on contracts and for vested rights and legislative enactments, subjecting the aggressor to a specific measure of damages or a specific compensation, for the injury he causes may be in their nature penal, and come properly within the provisions of this 31st section, but rights and remedies of a purely civil nature which may be vested by statute in individuals, or which parties may acquire under statutory provisions partake in no degree of forfeiture or penalty, but are equally meritorious, and entitled to the same favor as rights upon contracts or other acquisitions, and actions upon them are equally within the reason and policy of the six years' rule of limitation, as actions upon contract, and cannot justly be confined to the narrower rule of three years limitation prescribed for penal actions. I cannot reconcile with the views I take of the general policy and principles of the article entitled "of the time of commencing actions for penalties and forfeitures," and the special provisions of the different sections of that article, the supposition or belief that the framers of it could intend to apply the short bar of three years limitation to all actions upon statute, or under statutory provisions by parties suing for their own benefit, without discrimination or exception. I must believe that the intention was to confine the three year limitation to actions by the party aggrieved, for penalties and forfeitures and analogous causes of action of a penal nature, and not to extend that bar to civil actions for rights and on remedies resulting from, or accruing under statutory provisions, not imposing upon aggressors or offenders any specific amount or rate of compensation or recompense, but leaving them to this common law liability and the common law measure of damages consequent thereon. Under these views of our system of limitation of suits and actions, the use and importance

of the term "cause" superadded by the first revisers to the term "forfeiture" in the new section introduced by them, is manifest. The provision might have been imperfect, or open to misconstruction without it. The term "forfeiture" might suffice to describe the actions to which the two preceding sections were to apply, but might not be held to embrace all the causes of action to which the new section was to extend, and the addition of the term penalty might not sufficiently enlarge its range, but the term "cause" was sure to be effectual, and rightly understood and applied, would extend the limitation prescribed by the section to penalties and all analogous causes partaking of the nature of forfeitures, but would carry it no farther.

In this connection it may be noted, that the indefinite term "cause" being immediately preceded in the sentence by the term forfeiture, may, if the intention of the Legislature, and the adaptation of the particular provision to the general character and purpose of the article and chapter of which it is parcel should require it, be understood and construed according to the maxim, *noscitur a sociis*, as meaning something of the same or like nature with forfeiture and analogous thereto. The section so construed provides, that "all actions upon any statute for any forfeiture or cause of the same or like nature, the benefit and suit whereof shall be limited to the party aggrieved, &c., shall be commenced within three years next after the offence committed or the cause of action accrued." That construction reconciles the section to the heading or title of the article to which it belongs, and conforms it to the classification that heading imports of the actions to which the times of limitation the article prescribes are to apply as being actions for penalties and forfeitures, and harmonizes moreover with the ordinary acceptance of the terms, "party aggrieved," so emphatically applicable to those who suffer from the aggressions of others, but so inappropriate and rarely applies to plaintiffs and parties who prosecute on contracts and liabilities for debts and damages.

If the causes of action to which this section is intended to

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apply cannot be by the settled rules of construction confined to causes of a penal nature, what bounds can be set to the section? If it is held to apply to all actions on any statute remedial or penal for any cause involving any statutory provision, and being for the benefit of the plaintiff or party aggrieved, will it not be made to comprehend large classes of actions which have never yet been understood or supposed to come within it? May not liabilities clearly within the reason and the very letter of the 4th subdivision of the 18th section, and always regarded and treated as being unquestionably entitled to the benefit of the full term of six years for the commencing of actions upon them, be brought within the range of the narrower rule of this thirty-first section and restricted to the shorter term of its three years limitation? The instances adduced by the counsel for the plaintiffs in error, to exhibit and illustrate the practical effect and operation of such an exposition of this section of the statute, are so appropriate and so striking that I deem it superfluous to extend them or to dwell upon them. Among them I notice the remedy given by statute to the endorsee against the maker and endorser of a promissory note, which was an innovation upon the common law system, and purely by statutory authority. It not only gave a new remedy on the note, but changed essentially its character and its properties, and altered materially the rights and liabilities of the parties to it. When first introduced, a reference to the statute authorizing it was deemed necessary in actions under the statute upon the note; but the suit or action itself was from the first and always has been, and notwithstanding the introduction into our statutes of limitation of the new and additional provision contained in this thirty-first section, has continued to be, and now is with us as in England the common law action of *assumpsit* or trespass on the case, upon the contract which the note, in the statutory sense and effect of it imports, and the statute limitation of six years held to apply to it. So too the other cases cited, of actions by and in the name of the assignee of a chose in action where the assignor is dead, and there is no executor or

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administrator; actions by and in the name of the purchaser of a chose in action at a receiver's sale; actions by and in the name of an assignee of a bond to the Sheriff; by and in the name of the assignee of a lessor against the lessee upon covenants in the lease; against the maker and endorser of a promissory note jointly; by the creditors of a deceased person against the heirs, devisees, legatees, and next of kin; by purchasers of real estate sold on execution against the owner of the judgment on the failure of title; by mechanics against the owner of a building to enforce a statutory lien for a debt due from the contractor; and actions against the owner of a carriage for the malicious act of the driver, are prominent instances of remedies, and some of them of rights created or given, improved or varied, by statute, but for and upon which common law actions are in familiar use, and the six years term of limitation constantly applied. For aught that I can see, the action in the case now before us is as far removed as any of these from the legitimate range of the short limitation; for it is substantially and in effect an action for the price or value of merchandize sold and delivered by the plaintiffs to a company of which the defendant was a member, and for the debts of which he is by law adapted by statutory provisions to the case, personally and individually liable. And if this action must be held to come within the 31st section, and not within the 4th subdivision of the 18th section, and the short bar of the three years limitation must be applied to it, I am yet to learn why it is that the same principle, if fairly and fully carried out, would not embrace those cases also, and all others of a similar character. The results of such an expansive application of the terms of this section, and the wide range of the short statute bar consequent upon it, must, I think, be decisive against that exposition of it, if the language of the statute admits of any other construction.

But we are told that the short bar of three years has been formerly decided to apply to a case similar in its leading features to this; and we are referred to the case of *Van Hook vs. Whitlock* as establishing the rule. In that case the credi-

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tors of the Commercial Insurance Company of New York filed a bill in the Court of Chancery against stockholders of the company, to charge them with debts of the company, on the ground of a personal liability under a special clause in the act of incorporation. The defendants took two grounds of defence to this suit, the statute of limitations, and a discharge from the liability under an act of the Legislature, authorizing the discharge of insolvent insurance companies and their stockholders from the debts of the company upon making an assignment of the corporate estate and effects for the benefit of the creditors, they, the defendants, averring that such assignment had been made and that the complainants had accepted and received dividends under it. The Vice Chancellor of the First Circuit, before whom the question first came, sustained the defence of the statute of limitation. He held that the clause establishing the short bar of three years limitation was not confined to penal action, or such as might be brought for a forfeiture, but applied to actions for any cause and upon any statute whatever, for a forfeiture or other cause founded upon statute liability and given or limited to the party aggrieved. That the action before him fell directly within the letter and spirit of that clause, and it not having been brought within three years next after the cause of action accrued, he, on those grounds, without passing upon the other questions in the cause, dismissed the complainant's bill. The Chancellor on an appeal to him inclined to the same opinion and confirmed the Vice Chancellor's decision. From the Chancellor's decree, the plaintiffs appealed to the Court for the Correction of Errors, and the appeal came on to be heard by that Court in 1841, when the decree of the Chancellor was affirmed, not on the ground taken by the Vice Chancellor and approved by the Chancellor, but upon the other branch of the defence. The affirmance was upon the ground that the creditors who were prosecuting the suit, had affirmed the validity of the assignment by receiving dividends under it. That although the statute under which the assignment was made was unconstitutional and void, as to creditors whose demands existed previous to the passage of the

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act, still, that the creditors having come in and accepted dividends under the assignment, had assented thereto and affirmed it, and that they could not afterwards avail themselves of the personal responsibility of the stockholders under the charter for the payment of the debts of the company. Upon the point which is alledged to have involved the question now before us, on the application of the statute of limitation to the case, no decision was made, and no opinion was expressed by the court. But Chief Justice Nelson, then of the Supreme Court of this State, now one of the Judges of the Supreme Court of the United States, who delivered the opinion of the Court for the Correction of Errors on that occasion, advertng to the question of the statute of limitations, observed that he did not intend to discuss that question, not deeming it material to the view he had taken of the case, but that he felt bound to present it for the purpose of entering his dissent to the construction attempted to be given to the clause. "If it really possesses the sweeping effect claimed," observed the learned Judge, "for ought I see it would present a short bar of three years to any action and cause of action arising out of, and founded upon any statutory regulation." He instanced the case of suits against the the President of Associations under the general banking law, as being as completely founded upon statute and the creditor as much aggrieved by the non-payment of his debt as could be predicated of the case then under consideration, and if the three years' bar was applicable to the one, he did not see, he said, how it could be consistently denied to the other. This was the only opinion given, and from its decisive tone, and the clear and very decided opinion it expressed with the manner of announcing it, and the silence of the other members of the Court, it may be fairly taken if not to express the views of the Court on the subject, at least to indicate the absence of all intention of that Court to affirm the opinion of the Courts that preceded it on this point. The decision therefore of the Court of Chancery in that case on the point, though entitled to our respectful consideration, is not binding upon us, and my own reflections on the subject

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upon the fullest consideration I have been able to give it, have led me to a different conclusion. To this conclusion, and the views taken by this Court of the provision now under review, the learned Chancellor himself would appear, from his opinion on the point, when the question was before him, not to be irreconcilably adverse or very strongly opposed. He concurred, it is true, in the decision of the Vice Chancellor, and suggested considerations certainly not without weight, in favor of the Vice Chancellor's exposition of the clause in question; but he at the same time conceded that it is very doubtful whether the Legislature by that provision, intended to include any of that class of actions which are founded partly upon the common law and partly upon statutory provisions, and which are not in the nature of a forfeiture, and which class of actions was already provided for in the previous sections of the act. From these intimations we may, I think, fairly infer that the exposition of the statute which this significant doubt suggests, would not be regarded by him as wholly inadmissible, and that exposition would effectually except and exclude the case now under consideration from the rule to which the Supreme Court adheres; for the personal liability imputed to this defendant is, at most, but partly founded on statutory provisions, is not in the nature of a forfeiture, and is amply provided for in the previous 18th section of the chapter. The construction of this 31st section, and the term "cause" as used therein, suggested by the strongly expressed doubt of the Chancellor, certainly approaches very near, if it does not come fully up to the standard of the exposition herein given of them.

But if our construction of the clause should confine it to still narrower limits, I am satisfied that the sense and meaning we attach to it is not too restrictive. It is an exposition of it, which, in my judgment, gives it all the efficacy and extension required to fill up the space in the system of limitation of the times of commencing actions on statutes left by the statute of Elizabeth, and which it was the purpose of the new provision of the act of 1788 to supply. It reconciles the 31st section

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with the 4th subdivision of the 18th section of the chapter of the revised statutes providing for the limitation of the times of commencing actions, gives distinct but appropriate and sufficiently full effect to both, and it vindicates the statute from the reproach of subjecting actions for rights and interests founded on good and valuable considerations acquired under or rendered more effectual by statutory provisions to the same short bar of limitation with actions for penalties. The action of these plaintiffs is for the value of merchandize, sold and delivered by them to a company of which the defendant was a member, and which, though possessing a corporate capacity by the fundamental law of its corporate existence, operated and contracted on the personal liability of its stockholders as well as the corporate responsibility of the company for the payment of its debts. The contract being with the company, a reference to the statute became necessary in order to show the connection of the stockholder therewith, and with the liability it created, but the liability thus shown not being for any penalty or forfeiture incurred by the stockholders, nor any cause in any wise penal in its nature, but for the debt contracted by the purchase of the goods, comes clearly within the letter and spirit of the 4th subdivision of the 18th section, and the provision of the 31st section does not extend to, or embrace it. The action, therefore, not being upon the statute for a cause within the 31st section of the chapter, the short bar of three years limitation prescribed by that section is not applicable to it, and the demurrer to the defendant's special plea was well taken and ought to have been allowed. The judgment of the Supreme Court must be reversed.

Bronson, J. I concur fully in the opinion which has just been delivered by my brother Jones, and will add only a few words by way of explanation. This case was only brought before the Supreme Court *pro forma*, as the question had been previously decided in *Freeland v. McCullough*, 1 Denio, 414. That case was not fully argued; and when it was decided, one of the principles which had been settled in relation to this

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class of cases was entirely absent from my mind. Had it been mentioned or thought of, I could not have concurred, as I did, in the judgment which was rendered by the Supreme Court. It had been several times held, that the stockholders of this and other like companies, stood substantially upon the same footing as to liability as though they had been partners, or an unincorporated association; that they were answerable to the creditors of the company as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation. (*Allen vs. Sewall*, 2 *Wend.* 338; *Ex parte Van Riper*, 20 *id.* 614; *Moss vs. Oakley*, 2 *Hill* 265, 269; *Bailey vs. Banker*, 8 *id.* 188; *Harger vs. McCullough*, 2 *Denio*, 119, 128.) In this view of the matter it is entirely clear, that the three years statute of limitations is not applicable to the case. I am therefore of opinion that the judgment of the Supreme Court should be reversed, and that judgment should be rendered for the plaintiffs on the demurrer.

Ordered accordingly.

JAWETT, Ch. J. dissented.

WOOD vs. WEIANT and others.

The act of 1833, (*laws of 1833, ch. 271, § 9*) in relation to the proof and acknowledgement of written instruments, has not changed the provision of the Revised Statutes which requires a certificate of the County Clerk in order to entitle a conveyance of real estate, proved or acknowledged before a Commissioner of Deeds or County Judge not of the degree of counsellor, to be read in evidence or recorded in any other county than that in which the Commissioner or Judge resides.

Accordingly *held*, that a conveyance of real estate, acknowledged before a Commissioner in and for the county of Orange, in 1836, could not be read in evidence at the Circuit in Rockland County, without the certificate of the Clerk of Orange county.

ERROR to the Supreme Court, where the action was trespass for cutting and carrying away timber from certain lands in Haverstraw, Rockland County, tried at the Rockland Circuit, before RUGGLES, Circuit Judge. The question was mainly one of boundary between the premises owned by the plaintiff and Weiant respectively; and on the trial it became material to the plaintiff's case to introduce in evidence a deed of the premises in question, or of adjoining lands, executed in 1836, and acknowledged before a Commissioner of Deeds for the County of Orange. The Judge rejected the evidence because there was no certificate of the Clerk of Orange County pursuant to 1 R. S. 759, § 18. The plaintiff insisted that the deed might be read under the act of 1833, (*Stat. 1833, p. 396, § 9*) and excepted to the opinion of the Judge. A verdict having passed for the defendant, the plaintiff, on a bill of exceptions presenting this and other questions, moved for a new trial in the first instance before the Circuit Judge, who, on denying the motion, delivered a written opinion, which so far as it relates to this point is subjoined.

RUGGLES, CIR. J. "The counsel for the plaintiff contends, that the act of 1833, ch. 271, sec. 19, (2 R. S. 325, sec. 74,) has altered the law in relation to the reading of deeds in evidence, and made the Clerk's certificate unnecessary. But I

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think the law in relation to receiving deeds in evidence is not altered. This section was not intended to apply to deeds of real estate; they were already provided for, and when that section provides that the instruments embraced within its scope shall be received in evidence in the same manner as if they were deeds, it recognizes the existing law in relation to deeds as still in force, and puts other instruments on the same footing as deeds, not only with respect to the certificate of acknowledgment or proof, but with respect to the authentication of the certificate by the County Clerk."

The Supreme Court, on appeal from the Circuit Judge, also refused a new trial, and rendered judgment for the defendant.

H. S. Dodge, for plaintiff in error.

A. Taber, for defendant in error.

After deliberation, all the Judges were of opinion that the question in regard to the admissibility of the deed in evidence was properly decided at the Circuit.

JEWETT, CH. J., and GARDINER, WRIGHT, and GRAY, Js., were for reversing the judgment on another ground.

BRONSON, RUGGLES, JONES, and JOHNSON, Js., were for affirmance.

Judgment affirmed.

Doughty v. Hope.

DOUGHTY vs. HOPE.

1	79
147	668

Where property is taken under a statute authority, without the consent of the owner, the power must be strictly followed; and if any material link is wanting, the whole proceeding is void.

Where three persons were authorized to estimate the expense of a public improvement in the city of New York, and to assess the same upon the owners and occupants benefited, and one of the three persons was not consulted and did not act in making such estimate and assessment; *held*, that the proceeding was void, and that no title could be deduced through a sale made for the non-payment of such assessment.

Where an assessment is signed by two of the persons so authorized, it seems the legal presumption is, that the third was present and acted in the business; but it may nevertheless be shewn that he was not consulted and did not act.

One of the assessors who signed the certificate, is a competent witness to prove that the third assessor was not consulted.

The ratification by the Common Council of the city of New York, of a void assessment, does not aid the proceeding. To make out a title there must be a valid assessment duly ratified.

A request for instruction to a jury should rest upon undisputed facts or a hypothetical case; and if the proposition which the party submits be not right in all its parts, both as to fact and law, the Judge may refuse to give the instruction asked for, and need not qualify such refusal by pointing out the good and the bad parts of the proposition.

The publication of the redemption notice required by *Stat. 1816, p. 114, § 2, as amended by Stat. 1840, p. 274, § 10*, after a sale for a tax or assessment, must be fully completed before the commencement of the last six months of the two years succeeding the sale, and an omission in this respect will invalidate the purchaser's title.

Where the redemption notice is not published according to law, a regular notice served after the execution of the lease given upon the sale, pursuant to *Stat. 1841, p. 211, § 3*, and the certificate by the Street Commissioner, required by § 7 of the same act, do not confirm the title.

The statute which declares that the lease given upon a sale for taxes or assessments in the city of New York, "shall be conclusive evidence that the sale was regular," &c. (*Stat. 1816, p. 115, § 2*) refers only to the notice of sale and the proceedings at the auction.

On error from the Supreme Court. Doughty brought ejectment against Hope to recover possession of a house and lot, situated in the 12th ward of the city of New York. The cause was first tried before Edmonds, Circuit Judge in May, 1845, when a verdict was had for the defendant. The Supreme

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Court, on bill of exceptions, set aside the verdict and granted a new trial. (See 3 *Denio*, 249.) The cause was tried again before the same Circuit Judge, at the New York Circuit, in October, 1846, and on this trial the case was as follows :

The plaintiff claimed to recover under a lease from the corporation of the city of New York, conveying to him a term of 800 years, on a sale for the non-payment of an assessment for setting the curb and gutter stones in 125th street, between the 3rd and 4th avenues. The defendant claimed under the owner in fee, against whom the assessment was made. The ordinance for setting the curb and gutter stones was passed in April 1836, and by the same ordinance Messrs. Warner, Gaines, and Secor, were appointed to make an estimate of the expense of carrying into effect the ordinance, and a just and equitable assessment thereof among the owners or occupants of all the houses and lots intended to be benefitted thereby. The three persons thus appointed took the oath required by law. The estimate and assessment were made and returned in September 1837, but the return was signed by only two of the assessors, Warner and Gaines. Warner who was called by the plaintiff as a witness to prove the assessment, on his cross examination gave some evidence tending to show that Secor, the other assessor did not act, and was not consulted in regard to it. The assessment was confirmed by the Common Council on the 4th of April 1838, and such further proceedings were had, that the premises in question were sold for the non-payment of the assessment on the 20th of June, 1840, and the plaintiff became the purchaser for the term of 800 years. In pursuance of this sale, the grant or lease under which the plaintiff claimed, was executed on the 20th of June, 1842. The lease was introduced in evidence by the plaintiff, which recited the proceedings prior to the sale, and that no redemption had been made within two years from the time of the sale.

The plaintiff also proved that the notice to redeem the premises required by law, (*Stat. of 1816, p. 114, as amended by the act of 1840, p. 271, § 10,*) was published in the Evening

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Post twice a week for six weeks successively, *commencing on the 18th of December, 1841, and ending January 21, 1842.* He further proved that after the execution of the lease the further notice required by the act of 1841, (*Laws of 1841, p. 211, § 3,*) in order to render the sale absolute, was duly served; and that on the 31st of July, 1843, the Street Commissioner gave to him a certificate in due form pursuant to the 7th section of the statute last cited, stating that the premises had not been redeemed, and that such notice had been duly served.

The evidence being closed, the plaintiff's counsel insisted, 1st, that the confirmation of the assessment by the Common Council was binding and conclusive, whatever irregularity might have occurred in making such assessment. The Circuit Judge held otherwise, and the plaintiff excepted. 2. That it appearing in the evidence (as the counsel claimed) that all the assessors had taken the oath, and adopted the principle of making the assessment, and were all in the Street Commissioner's office when it was made, it was to be presumed that Secor, who did not sign the report, met and consulted with those who did sign it, and that such presumption could not be rebutted by any impression or non-recollection of the witness Warner; also that Secor alone could prove that he did not act with the others, and as his absence was unaccounted for, no secondary evidence could go to the jury. The Judge ruled that the legal presumption was, as claimed, that all the assessors acted, although only two signed the report, but he refused to charge any thing else contained in this proposition, and left it to the jury to find, upon the evidence of Warner, whether all the assessors were consulted and acted; and in case the jury should find that one of them had nothing to do with making the assessment, then he charged that such assessment was invalid. The plaintiff excepted. 3. That the redemption notice was sufficiently published provided such publication ended at any time before the expiration of two years from the time of sale, or if not so, that the statutes on this subject were *directory* merely. The Judge declined so to hold, and

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charged that such publication must end and be complete before the commencement of the last six months of the two years succeeding the sale, and that if the notice was not so published, it was a fatal defect in the plaintiff's title. The plaintiff excepted. 4. That the Street Commissioner's certificate, given pursuant to the act of 1841, was conclusive, and therefore that the defendant could not avail himself of any defect in the publication of the redemption notice. The Judge refused so to charge, and the plaintiff excepted. 5. That the lease was, by the act of 1816, conclusive evidence of the regularity of the sale, and therefore the defendant could not avail himself of any defect in the publication of the redemption notice. The Judge refused so to charge, and the plaintiff excepted. The jury found a verdict for the defendant. The plaintiff moved the Supreme Court for a new trial upon a bill of exceptions, presenting the above questions. The motion was denied, and judgment rendered for the defendant.

A. Thompson, for plaintiff in error.

R. Mott for defendant in error.

After deliberation, the Court (GARDINER, J. dissenting) affirmed the judgment of the Supreme Court, for the same reasons, substantially, which were assigned by that Court in rendering its judgment. (*See 3 Denio 598.*)

Henry v. Salina Bank.

HENRY impleaded with PIERCE vs. THE BANK OF SALINA.

A plaintiff on the record, or plaintiff in interest, when called upon to testify under the usury act of 1837, cannot be compelled to disclose facts tending to shew that the promissory note, to recover which the suit is brought, was discounted by him in violation of the statute (1 R. S. 595, § 28) concerning the discounting of notes, &c., by officers and agents of banking corporations.

A note discounted by the Teller of a Bank, for his own benefit, in violation of the statute above cited, is void; and where the note alleged to have been so discounted was in suit for his benefit, and in opening the defence to the jury, this was stated as one ground of defence, and usury as another ground, such Teller, although ostensibly called as a witness to prove the usury, cannot be required to disclose the transaction for the reason that his testimony might subject him to a loss of the note upon a ground distinct from the defence of usury.

A witness, or party called as a witness, may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or forfeiture.

Where a witness objected to testifying on the ground that his testimony might subject him to an indictment, or prosecution for a penalty, it is not, in a Court of Review, an answer to the claim of privilege, that the statute of limitations has run against the offence, unless it appear that such answer was suggested on the trial. *Per Bronson, J.*

On error from the Supreme Court. The Bank of Salina sued Henry and Pierce in the Court below upon a promissory note signed by Pierce as principal, and Henry as surety, payable to the bank and not negotiable. Henry pleaded the general issue and gave notice of the defence of usury, verifying the notice according to the usury act of 1837. On the trial at the Circuit in April, 1844, after the plaintiffs had rested, the defendant's counsel opened the defence to the jury, and stated, among other things, that the note was made to be discounted at the plaintiffs' bank, and was in the first instance presented by Pierce to the bank for discount; that the bank refused to discount it; that this fact was known to *Elisha Chapman*, who was the teller of the bank; that the note was afterwards presented to Chapman, who, with full knowledge that the note had been presented to the bank for discount and refused, discounted the same, and in so doing deducted \$10

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from the face of the note, under a corrupt and usurious agreement between him and Pierce. The note was payable in sixty-three days from its date.

To prove this defence the defendant called the said Chapman and had him sworn as a witness, and in the first instance proposed to prove by him, under the plea of the general issue, that the note was usurious and void. Chapman objected to answering on the ground that his testimony would form a link in the chain of evidence to convict him of a misdemeanor, or would expose him to a penalty or forfeiture. In support of the objection it was insisted that when called as a mere witness, and not as a party under the usury act of 1887, he could not be compelled to testify under the provisions of that act. It was also insisted that he was protected from answering under 1 R. S. 595, § 28, which declares that "no president, director, cashier, clerk or agent, of any corporation having banking powers, and no person in any way interested or concerned in the management of any such corporation, shall discount or directly or indirectly make any loan upon any note which he shall know to have been offered for discount to the directors, or to any officer of such corporation, and to have been refused, and that every person violating the provisions of that section shall for each offence forfeit twice the amount of the loan which he shall have made." The Circuit Judge sustained the objection of the witness, and the defendant excepted.

The defendant then offered to prove the usury by the same witness *under the notice of the defence of usury served with the plea, on the ground that he was the plaintiff in interest.* The witness again objected on the grounds, *first*, that the act of 1887 did not require him to testify, unless it should first appear that he was the plaintiff in interest and the owner of the note, and *second*, that he could not answer and shew himself to be the owner of the note, without subjecting himself to a penalty or forfeiture under the statute which is above set forth, or without establishing a link in the chain of evidence which might subject him to a penalty or forfeiture, under that statute. Objection sustained and defendant excepted.

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The defendant then offered to prove by the witness that he was the party in interest. This was objected to by the witness, and the objection sustained on the same grounds, and an exception taken. A verdict was had for the plaintiffs, and the defendant moved the Supreme Court for a new trial on a bill of exceptions. That motion was denied and judgment rendered for the plaintiffs. (*See 2 Denio 155.*)

Wm. J. Hough, for plaintiff in error. 1. Chapman was bound to testify as a witness under the general issue. The case, as disclosed in opening the defence to the jury, did not show that he had actually received usury so as to expose him to an indictment for a misdemeanor, or if it did, the statute of limitations had run so as to be a bar to any such indictment. 2. The defendant should have been permitted to prove by the witness, under the notice annexed to the plea, that he was the plaintiff in interest, and also the usurious agreement. The usury act of 1837 would protect him against the use of his testimony to subject him to any criminal prosecution or penalty or forfeiture; or at all events the statutes of limitation would be a perfect protection. (*Henry vs. Bank of Salina*, 5 *Hill* 523, 525-6-7; *Stephens vs. White*, *id.* 548; *Oless vs. Olney*, 1 *Denio* 819; 1 *Phil. ev.* 228, note (a); 1 *Cow and Hill's notes* 739; *The People vs. Mather*, 5 *Wend.* 229, 250, 257.)

N. Hill, Jun., and Geo. F. Comstock, for defendants in error, in addition to the grounds upon which the judgment of the Supreme Court was placed, insisted, that if the note was discounted in violation of the statute above referred to concerning banking corporations, it was void and could not be recovered in this action, (*Chitty on Cont.* 6 *Am. ed.* 656, 657; *Story on Cont.* § 218, *gc.*; *Collins vs. Blantern*, 1 *Smith's leading cases* 169; *Nellis vs. Clark*, 20 *Wend.* 32,) and regarding Chapman as plaintiff in interest, (as he was claimed to be on the trial) his testimony, if he should disclose the transaction or any part of it, might be used on the trial to

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defeat a recovery upon this ground, even if the defence of usury should fail, and thus subject him to a loss of the money he had loaned. This would be such a forfeiture as would bring him within the rule of protection; and against this forfeiture no statute of limitations had commenced to run. (*Livingston vs. Harris*, 11 *Wend.* 330, 331; *S. C.* 3 *Paige* 533, 538; *Story's eq. pl.* §§ 579, 580, 2, 3, 4; 1 *Greenl. cv.* § 452, and notes, 2 *R. S.* 405, § 71.)

BRONSON, J. There is another ground, besides those mentioned by the Supreme Court, on which Chapman was privileged from answering the questions put to him. It was one branch of the defence that the witness, being the teller of the bank, discounted the note after it had, with his knowledge, been offered for discount to the directors, and been refused by them. If this fact could be established, Chapman would not only forfeit twice the amount of the loan which he made, (1 *R. S.* 595, § 28,) but he would forfeit the debt itself. As the discounting of the note was expressly forbidden by the statute, there can be no doubt that the security would be void. A witness must speak, though the answer may establish that he owes a debt, or is otherwise subject to a civil suit; but he is not bound to speak where the answer may subject him to a forfeiture, or any thing in the nature of a forfeiture of his estate or interest. (2 *R. S.* 405, § 71; 1 *Phil. cv.* 278; *Mitf. Plead.* 197, ed. of '33; *Livingston vs. Tompkins*, 4 *John. Chan.* 432; *Livingston vs. Harris*, 3 *Paige* 533, and 11 *Wendell* 329, *S. C. in error.*) As the answer of the witness might tend to establish facts which would work a forfeiture of the debt, he was not obliged to testify. This ground is of itself sufficient to establish the privilege of the witness; and as to this, the statute of limitations has no application.

The grounds on which the privilege of the witness was put by the Supreme Court are equally conclusive, unless a prosecution under the usury law, and a suit under the bank law for twice the amount of the loan, had been barred by the statute of limitations; and there is nothing in the case to show that

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a prosecution, or a suit, or both of them, had not been commenced in due time. In all the cases where it has been held that the running of the statute took away the privilege of the witness, it expressly appeared, not only that the time for suing or prosecuting had elapsed, but that no suit or prosecution had been commenced, or if one had been commenced, that it had been discontinued. Here the statute was not even mentioned on the trial. It may not have been necessary for the defendant to prove the negative fact that no suit or prosecution had been commenced. But if he intended to rely on the statute, he was at least bound to say so; and then the witness might have answered, that proceedings against him had already been commenced.

The witness claimed his privilege, and there was a *prima facie* case for allowing it. If there was any answer to that case, the defendant should have mentioned it, for the double purpose of allowing the truth of the supposed answer to be examined at the proper time, and of dealing fairly with his adversary and the Circuit Judge. A party is not at liberty to start a question, on a motion for a new trial, or in a Court of Review, which, had it been mentioned on the trial, might have received a satisfactory answer. This is a principle of every-day application, and there is nothing in this case which should induce a departure from it.

WRIGHT, J. A president, director, cashier, clerk, agent, or any person in any way interested or concerned in the management of the concerns of any banking corporation, is prohibited by statute from discounting, or directly or indirectly making any loan upon any note, bill, or other evidence of debt, which shall have been offered to the directors of such banking corporation for discount; and every note, bill, or other evidence of debt, so discounted, or upon which any loan shall have been made by any of the persons aforesaid, knowing that such note has been so offered and refused, shall be utterly void. (1 R. S. 604, § 10.) The statute declaring the act of discount or loan unlawful, the note or bill would also be

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void upon general principles. It is a settled doctrine that a contract prohibited by statute is void.

The defendants' counsel, among other things, stated to the jury, in opening the defence, that the note in question had been presented in the first instance to the Bank of Salina for discount; that the bank refused to discount it; that this was known to Elisha Chapman, who was at that time the teller of the bank; that the note was subsequently presented to the said Elisha Chapman, who, with full knowledge that the same had been presented at the bank and refused, discounted the note, and in so doing, deducted \$10 from the face thereof under a corrupt and usurious agreement between him and the defendant, Pierce. Chapman was then called as a witness, and both under the plea of the general issue, as a mere witness, and under the notice annexed to and served with the plea, as plaintiff in interest, refused to answer any of the several questions put to him, urging, amongst other grounds, that such answers might form a link in the chain of testimony tending to expose him to a penalty or forfeiture.

Without discussing the questions whether Chapman, when called as a mere witness, and not as plaintiff under the usury law of 1837, was protected by that statute, or whether when called under the notice annexed to the plea of the general issue, as plaintiff in interest, before he can be compelled to answer and criminate himself, it must first appear that he is the plaintiff in interest; or whether for the reason that the statute of limitations had run both against the criminal offence of usury, and the forfeiture of twice the amount of the loan, under 1 R. S. 595, § 28, he was protected against the consequences of his testimony, I am of the opinion that the witness was privileged from testifying. Any one of the questions propounded might have formed one link in a chain of testimony tending to bring him within the statutory prohibition as to the discounting of notes by bank officers, and showing him guilty of an unlawful act, one of the consequences of which was an utter forfeiture and loss of the note. And this was a consequence from which the statute of limitations could

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not save him. The rule is well settled that a witness is not required to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture; or when, by answering, a link may be added to a chain of testimony tending to such a result. The defendants proposed to shew a state of facts, in which Chapman was the guilty actor, rendering the note utterly void. They were therefore called upon to shew it without his aid. The act of 1837, authorizes the calling and examination of the plaintiff *for the purpose of proving the usury*, and excuses him from criminal prosecution; but I cannot agree to the doctrine advanced by the counsel for the defendants, that when called under that act, whether the interrogations propounded tend to subject him to a penalty or forfeiture, distinct from the question of usury or not, he is bound to answer.

The judgment of the Supreme Court should be affirmed.

GRAY, J. delivered a written opinion in favor of reversing the judgment.

All the other Judges were for affirming the judgment upon the ground taken in the opinion of WRIGHT, J., and first considered in the opinion of BRONSON, J., but without considering or passing upon the other questions presented.

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1	90
118	178

JENCKS vs. SMITH.

Where A occupied land under H, and by the terms of their agreement the grass belonged to A; *held*, that A might transfer such grass, while yet growing, by a personal mortgage.

Where upon a trial there is opportunity for objection, and the party whose duty it is to object, remains silent, all reasonable intendments will be made, in a Court of Review, to uphold the judgment.

The defendant, in a Justices' Court, claimed the property by virtue of a personal mortgage, which was read in evidence without objection. It also appeared that the mortgage had been filed; but the return of the Justice did not shew that there was any evidence that such filing was in the town where the mortgagor resided, or where the property was situated, as required by the statute, (*Laws of 1833, chap. 279*;) nor did it appear, from the return, that the plaintiff, who claimed the property as purchaser under an execution against the mortgagor, made any objection on the ground of such defect in the evidence; *held*, that such an objection could not be taken in the Court of Common Pleas on *certiorari*.

On error from the Supreme Court. Smith sued Jencks before a Justice of the Peace of the County of Madison, and declared in trespass for taking a quantity of hay. The defendant pleaded the general issue, and gave notice that he would prove the hay belonged to him by virtue of a chattel mortgage, executed upon the same by one Philip Arnold. On the trial the plaintiff claimed the hay by virtue of a sale to him under an execution, issued from a Justices' Court, against the said Philip Arnold. Arnold cut the hay upon land which he occupied under one Hunt. The hay was cut and stacked on Saturday, and on the Monday following the above execution was levied upon it, and the plaintiff bought it at the constable's sale.

Shortly before the hay was cut, Arnold had executed to the defendant a personal mortgage upon it, which, as Arnold testified, was given for a book account which he owed the defendant. He also testified that it was a *bona fide* transaction. The mortgage was read in evidence, and the return of the Justice does not shew that any objection was made to this evidence. A witness also testified that he saw the mortgage

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filed, but the return does not shew that the mortgagor resided, nor that the property was situated in the town where the mortgage was filed, nor does it shew that any objection was made on that ground. It appeared that when the hay was levied upon, it had not been actually delivered to the defendant. After the levy, and before the sale, Arnold stated, in presence of the agent by whom the plaintiff bid off the hay, that he had given a mortgage upon it to the defendant. The defendant removed the hay by virtue of his mortgage, and for that the suit was brought. The return, after setting out the above and some other facts, states, "The testimony was here closed." The jury gave a verdict for the defendant, on which the Justice entered judgment in his favor. This judgment was affirmed by the Court of Common Pleas upon *certiorari*, but was reversed in the Supreme Court, on writ of error. (*sec 1 Denio 580.*)

H. G. Wheaton, for plaintiff in error.

Wm. J. Hough, for defendant in error.

WRIGHT, J. Two points were made on the argument of this cause: 1. That the mortgage gave the defendant (in the Justices' Court) no subsisting lien upon the grass, as it is not the subject of conveyance or pledge, as security, by chattel mortgage. 2d. That there was no proof on the trial before the Justice of the residence of the mortgagor, at the time of the execution of the mortgage; or that, when executed, the property was in the town in which the mortgage was filed.

With regard to the first point, I concur with the reasoning of the Supreme Court. (*1 Denio 580.*) It was assumed by both parties, on the trial, that by an agreement between Hunt the owner of the land, and Arnold the mortgagor, the grass, at the time the mortgage was given, was the property of Arnold. Both claimed through him. Hunt made no claim, nor was he a party to the controversy. The undisputed ownership of the grass being in Arnold, I see no objec-

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tion to his passing his title by a sale, or mortgaging his interest in it. At all events, the transfer to the mortgagee became perfect on its severance from the freehold.

The act of 1883, chap. 279, provides that every mortgage, or conveyance intended to operate as a mortgage of goods and chattels, thereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void, as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be filed in the town or city where the mortgagor, if a resident of this State, shall reside at the time of the execution thereof; and if not a resident, then in the city or town where the property so mortgaged shall be at the time of the execution of such instrument. It is now insisted, that there was no proof on the trial of the residence of the mortgagor, nor did it appear that the mortgage was filed in the town where the property was at the time of its execution. If the return of the Justice showed affirmatively that this proof was wanting, and that objection was raised, before the Justice, on account of the absence of it, the defect would be fatal. But the return is merely silent on the point, and no objection appears to have been taken before the Justice. Where opportunity is given for objections, and none are made, but the party, whose duty it is to object, remains silent, all reasonable intendments will be made by a Court of Error to uphold the judgment. This doctrine, founded in good sense, has been promulgated, in a series of decisions, by the Courts of this State. In the case of *Baldwin vs. Calkins*, (10 *Wend. R.* 167) on *certiorari*, the Supreme Court held that an omission to object will even authorize the inference of a fact necessary to confer jurisdiction. In *Menderback vs. Hopkins*, (8 *John. R.* 436) a constable, having an execution, paid the amount to the plaintiff, without any demand of, or request by the defendant, and afterwards sued the defendant for the money so paid. There was no evidence on the trial that the constable had made a

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demand on the defendant, or that he had been requested by him to make the payment. The Court said, "a demand and request may have been presumed. It was to be inferred as admitted, when nothing was said to the contrary. Indeed, as no objection was made to any of the testimony, but it was submitted to the jury, every inference that could be drawn from the evidence, is to be presumed to have been drawn, and the verdict, by reasonable intendment, is good." In *Fort vs. Monroe*, (20 *Wend. R.* 210) case was brought for negligence of a servant of the defendant in driving a gig, by which a son of the plaintiff was run over and killed. There was no evidence to shew that the servant was acting in the business of the master, or within the scope of his authority, nor was that point made upon the trial, either on a motion for a nonsuit, or after the testimony had closed. On a motion for a new trial, the Supreme Court remarked: "The case seems to have been tried and defended upon the assumption of the existence of the relation of master and servant between the defendant and the person driving the carriage. It would, therefore, be unreasonable to disturb the verdict upon the ground now urged, as the counsel did not choose to avail himself of it when it could have been removed, by his adversary, by the production of proof." In *Oakley vs. Van Horn*, (21 *Wend. R.* 305) the collector of a school district was sued, in a Justices' Court, in trespass, for levying upon and selling a saddle for a school tax. In the return of the Justice it did not appear that any evidence was given to shew that before the levy the collector demanded the payment of the tax, nor on the other hand did it appear that the absence of such proof was objected to or in any way noticed on the trial. The collector had judgment, and the Supreme Court, in affirming it, say: "If we are authorized to hold, from the return, that no demand was made of the tax in question, previous to the levy, and that the point was duly raised in the Justices' Court, there was error. But in the case at bar, the return is merely silent as to the proof of demand. No objection appears to have been made on that account, nor does it appear, affirmatively,

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that the proof was wanting. We must intend, therefore, that it was given. Had the objection now raised come before us on a bill of exceptions, it must have been shewn affirmatively, that the collector failed to justify by proving a demand before he levied; and beside, that the defect was mentioned as an objection, for it is one that may be supplied, and we would intend that had the objection been raised it would have been obviated by proof of the fact. Here the parties were present with every opportunity to raise the point." In *Holbrook et. al. vs. Wight*, (24 *Wend. R.* 169) it was necessary for the plaintiffs to sustain their action, to prove that they had accepted or paid certain drafts. There was no direct evidence in the case as to the acceptance or payment, nor was there any objection on that ground raised on the trial. On a motion for a new trial, Cowen, Justice, who delivered the opinion of the Court, held the following language: "It is said there is no evidence in the case, that the plaintiffs had either accepted or paid the drafts. There is not, indeed, any direct evidence, but the fact of acceptance was assumed throughout the trial. The Judge referred to it in his charge to the jury. It is strange, if such a material fact were out of the case, that it was not mentioned as an objection and made a point."

In the present case the fact seems to have been assumed throughout the trial that Arnold was a resident of the town of De Ruyter at the execution of the mortgage; and no objections appearing upon the return, I think we should intend that it was proved or admitted. Clearly upon principle, aside from direct authority, it ought not to be tolerated, that parties should go to trial in a Justices' Court, raising no objections in its progress, or at its close, when any defect in the proof, if pointed out, might be obviated, and afterwards, being dissatisfied with the verdict, an Appellate Court should be urged to reverse the judgment of the Justice on an allegation of such defect.

The judgment of the Supreme Court should be reversed, and that of the Common Pleas and Justice affirmed

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BRONSON, J. On a more careful examination than I gave to the case when it was before the Supreme Court, I am satisfied that the judgment of that Court is erroneous. The mortgage was filed in the town of De Ruyter, where the Justice and the Jurors lived, and where the trial was had; and it does not appear that any objection was made on the trial that the mortgage had not been filed in the proper town, or that there was any defect of proof on that point. It was evidently assumed throughout the trial that De Ruyter was the town where the Mortgagor resided; and the case was litigated upon other grounds. I am of opinion, therefore, that the judgment of the Supreme Court should be reversed; and that the judgment of the Common Pleas should be affirmed.

GARDINER, RUGGLES, and JONES, Js., concurred.

JEWETT, CH. J. and GRAY, J. delivered opinions for affirmance, with whom JOHNSON, J. concurred.

Judgment of the Supreme Court reversed, and that of the Justice and Common Pleas affirmed.

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ABEL FRENCH, JR., vs. ROBERT D. CARHART.

Where a deed given in 1829 contained a clause by which it was made subject to a reservation contained in a conveyance of the same premises given in 1793, between other parties, and the question was upon the construction of the deed of 1829; *held*, that it was to be construed in the same manner, as though the language of the reservation as contained in the original deed were incorporated into and formed a part of the one in question.

In the construction of deeds and other instruments the intention of the parties is to govern, and where the language used is susceptible of more than one interpretation, courts will look at the surrounding circumstances existing when the contract is entered into, such as the situation of the parties, and of the subject matter of the contract.

A conveyance of real estate contained a clause referring to and adopting the reservations and conditions in a former conveyance of the same premises, and the reservation in such former conveyance was in these words: "Saving and always excepting to the said parties of the first part, their heirs and assigns, out of this present grant and release, all mines and minerals, that are now, or may be found within the premises hereby granted and released, *and all the creeks, hills, runs and streams of water*, and so much ground within the same premises, as they, the said parties of the first part, their heirs and assigns may think requisite and appropriate at any time hereafter, for the erection of the works and buildings whatsoever, for the convenient working of the said mines and also all such wood, fire wood and timber as they may think proper to use in building, repairing, accommodating, and working the said mines, with liberty to them, their heirs and assigns, and their and each of their servants to dig through and use the ground, for either of the said purposes, and to pass and repass through the premises, with their and each of their horses and cattle, carriages and servants, and to lay out roads therefor,"—and the habendum clause, contained a condition that the grantee, his heirs, &c., should not erect, or permit to be erected, any mill or mill dam upon the stream of water on the premises granted; *held*, that the reservation of the stream was for all purposes and not for mining purposes merely.

And in aid of this construction; *held* also, that it was proper to consider the evidence, which shewed that when the deed in question was given, the grantor owned the premises immediately below, on which were situated and used a mill and dam, which set the water back on to the land conveyed, and that the grantee knew of the existence of such mill and dam, and of the manner in which the stream was affected by their use.

Held also, that the reservation was not merely of the natural bed of the stream, but of a right to use the stream in the same manner, and to set back the water to the same extent, as when the grant was made.

Whatever is necessary to the fair and reasonable use of the thing excepted, is also reserved as incident to the exception.

A reservation in a deed of a right or privilege should be construed in the same

1	96
118	219
1	96
123	258
1	96
127	174
1	96
160	556

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way as a grant by the owner of the soil, of a similar right or privilege. *Per* JEWETT, CH. J.

If the language of a deed is ambiguous, the Court, in order to arrive at the intention of the parties, may look at their subsequent acts, and the manner in which the thing granted has been used, and enjoyed under the grant. *Per* JEWETT, CH. J.

Error from the Supreme Court. Carhart sued French for overflowing his land, situated upon a creek, called the Normanskill in Guilderland, Albany County, by means of a dam erected upon the stream below the premises overflowed.

On the trial at the Albany Circuit before Cushman, Circuit Judge, in October, 1843, the evidence tended to shew that in 1793, Abraham Ten Broeck and Wife gave a perpetual lease of the premises claimed by the plaintiff below, to John Bullock, which contained a reservation in these words: "Saving and always excepting to the said parties of the first part, their heirs and assigns, out of this present grant and release, all mines and minerals, that are now or may be found within the premises hereby granted and released, and all the creeks, kills, runs, and streams of water, and so much ground within the same premises, as they the said parties of the first part, their heirs and assigns may think requisite and appropriate at any time hereafter, for the erection of the works and buildings whatsoever, for the convenient working of the said mines, and also all such wood, fire-wood and timber, as they may think proper to use in building, repairing, accommodating, and working the said mines, with liberty to them, their heirs and assigns, and their and each of their servants to dig through and use the ground, for either of the said purposes, and to pass and re-pass through the premises, with their and each of their horses and cattle, carriages and servants, and to lay out roads therefor." In the habendum clause of the same lease, was a condition in these words: "And upon this condition, that neither the said John Bullock, nor his heirs, nor assigns do at any time hereafter erect or permit, or cause to be erected, any mill or milldam upon any creek, kill, river, or stream of water, within the premises hereby granted, nor give, nor cause to be given, any manner of let or obstruction whatsoever to the said parties of the first part, their heirs or assigns,

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to their and each of their prejudice in the full enjoyment of the rights, titles, and privileges saved to him or them by the saving and exception, before in these presents above mentioned." Then followed a clause giving a right to re-enter on failure in performance of the conditions.

In 1805, Ten Broeck and Wife conveyed to James McKoun and Abel French, Sen., the premises claimed by the defendant, and on which the dam in question is erected. This conveyance contained in the granting part the following clause: "Together with the privilege of erecting a dam at the fall above mentioned," (referring to the location where the dam in question is erected) not "exceeding five feet in height." As early as 1817, Abel French, Sen. erected a dam at the place indicated by this deed, and this dam (having been one or more times washed away and re-built) was continued down to the time of the trial, and during that period the water raised by such dam was used to supply a flouring mill upon the same premises. The defendant below rebuilt the dam in question in 1839.

On the 17th of February, 1829, Abel French, Sen. had become owner, under the titles from Ten Broeck, of the premises claimed by the plaintiff and defendant respectively, and on that day he conveyed the plaintiff's premises, (the same described in the declaration) to Jeremiah Van Auken, "*subject, among other things, to such covenants, reservations, and conditions, as are mentioned in the original deed or lease formerly given by Abraham Ten Broeck, deceased, to John Bullock.*" Van Auken went into possession and occupied until April, 1837, when he conveyed the same premises to the plaintiff, with the same reservations, and the like reference to the lease from Ten Broeck. The premises are bounded in these deeds, "on the South by the Normanskill." The defendant also derived his title from Abel French, Sen., to the premises on which the dam complained of was built. The evidence also tended to shew, that Van Auken during the time that he owned and occupied the plaintiff's premises, made no objection to the continuance of the dam, and that the

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plaintiff at the time he purchased, was acquainted with the premises, and knew of the existence of the dam, and the manner in which it affected the stream. The weight of testimony also went to shew, that the dam as rebuilt by the defendant raised the water no higher than the dam which preceded it had done, and no higher than it was raised when Van Auken and the plaintiff purchased respectively. The water was set back over a mile, and covered some three or four acres of the land claimed by the plaintiff. It did not appear that any mines or minerals had ever been found on the premises.

The Circuit Judge charged the jury that the only question for them to pass upon was as to the amount of the plaintiff's damages, that the plaintiff had shewn a perfect title to all the land covered by his deed *to the middle of the Normanskill, subject only to the reservation of the stream for mining purposes*. The defendant's counsel insisted and requested the Circuit Judge to charge, 1. That the conveyance of French to Van Auken, bounded Van Auken on the edge of the stream as it then was, and gave him no title to the land then under water. 2. That the reservation of all creeks, kills, streams and runs of water, was absolute for any and every purpose. 3. That the location of French's deed was a question of fact for the jury. 4. That the reservation in question was ambiguous, and its construction should be left to the jury upon the instruments themselves, and the surrounding circumstances which had been given in evidence. The Circuit Judge refused so to charge, and the defendant excepted to his charge and refusal to charge as requested. The jury found for the plaintiff. The Supreme Court on bill of exceptions refused to grant a new trial and gave judgment for the plaintiff.

J. Van Buren, (Atty. Gen'l.) for plaintiff in error.

I. The Judge erred in charging the jury that the reservation of "all creeks, kills, streams and runs of water" in French's deed was a reservation only for mining purposes.

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1. The "covenants, reservations and conditions" in the lease from Ten Broeck, are a part of the deed from Abel French, Sen., to Jeremiah Van Auken, under which plaintiff claimed title.
2. The reservation of "all creeks, kills, streams and runs of water" is absolute. (*Oakley vs. Stanley*, 5 *Wend.* 523; *Provost v. Calder*, 2 *Wend.* 517.)
3. The construction thus given by the Court to the deed from Abel French, Sen., in 1829, destroys the valuable prescriptive right the defendant has acquired by twenty-five years adverse possession.

II. The conveyance from French to Van Auken, with the reservation contained therein, bounded the said Van Auken on the edge of the stream as it then was, and gave him no title to the land then under water. (*Childs v. Starr*, 4 *Hill*, 369.)

III. The Judge erred in refusing to submit to the jury as a question of fact, the true location of French's deed to Van Auken. (*Frier v. Van Alen*, 8. *J. R.* 495; *Livingston v. Ten Broeck*, 16 *J. R.* 94; *Rockwell v. Adams*, 7 *Cow.*, 761; *Dibble v. Rogers*, 13 *Wend.* 566.)

M. T. Reynolds, for defendant in error. 1. The conveyance from French to Van Auken being absolute, and without reserving any right to flow any part of the lands conveyed, except such right as is reserved in the lease from Ten Broeck, divested the grantor of a right to flow the land conveyed. 2. The reservation in the lease referred to is in terms confined to the use of the stream for mining purposes only. 3. The grant containing an express reservation, thereby more strongly excludes all implied reservations.

JEWETT, CH. J. Taking into consideration the words of the exception and condition annexed, it appears plain to my mind that the reservation of the creeks, kills, runs and streams of water, was intended by the parties to the conveyance to be absolute and unqualified. There is an obvious distinction between the reservation, as it relates to mines and minerals, and

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the creeks, kills, runs and streams of water, and as it relates to the ground and wood, fire-wood and timber. In respect to the two *first* objects of the reservation, it applies, by its terms, to *all* of the mines and minerals, and to *all* of the creeks, kills, runs and streams of water. In regard to the *latter* two, the language is changed and qualified to *so much* ground, and *all such* wood, fire-wood and timber, as should be necessary for mining purposes, and excluding such part of the ground, and so much of the wood, &c., as should not be necessary for those purposes.

But conceding that the language is ambiguous, so as to cast a doubt upon the construction, there are extraneous facts in the case which deserve an attentive consideration. The *language* of the reservation we are considering, is found in the original perpetual lease from Ten Broeck to Bullock, given in 1798, but it is referred to and adopted in the deed from French to Van Auken in 1829, and is therefore to be construed precisely as though it were incorporated into and formed a part of that deed. Now the time when, and the circumstances under which that conveyance was made, are, as it seems to me, of great importance in the construction of the conveyance itself. The same dam now complained of was then in existence, and had existed for a long period. It was then, and had for many years been used to supply a head of water to operate the mills of the grantor a few rods below the premises granted. Those mills would be rendered useless and valueless without a continuance of the same right. No *mines* or *minerals* had ever been discovered, nor does it appear that either of the parties believed, or had any reason to believe, that any would ever be discovered, so as to render the reservation, under the construction claimed by the plaintiff below, of the least possible utility. These circumstances were in the view and contemplation of the parties at the time this reservation was incorporated into the deed of 1829, and they demonstrate, to my mind, that the intention was to reserve the waters of the Normanskill, for the same uses to which they were then, and had for a long time been applied. The con-

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trary supposition involves an absurdity which ought not to be imputed to either of the parties. Upon the construction which I place upon the reservation, the reason and object of it are plain and obvious. Upon the construction claimed by the plaintiff, it seems, to say the least, without any adequate object or aim.

It is a cardinal rule in the construction of contracts, that the intention of the parties is to be enquired into, and if not forbidden by law, is to be effectuated. Too much regard is not to be had to the proper and exact signification of words and sentences, so as to prevent the simple intention of the parties from taking effect. And whenever the language used is susceptible of more than one interpretation, the Courts will look at the surrounding circumstances existing when the contract was entered into, the situation of the parties, and of the subject matter of the instrument. To this extent, at least, the well settled rule is, that extraneous evidence is admissible to aid in the construction of written contracts. (*Wilson vs. Troup*, 2 Cow. 195, 228; *Parkhurst vs. Smith*, Willes. Rep. 332; *Bradley vs. The Washington, Alex. & Geo. S. P. Co.*, 13 Peters 89; *Gibson vs. Tyson*, 5 Watts. 34.) Applying this sound and rational principle to the language of the reservation in question, and to the extraneous circumstances just noticed, and it would seem impossible to err in the construction.

Another rule of construction is, that when the words of a grant are ambiguous, the Courts will call in aid the acts done under it, as a clue to the intention of the parties. (*Livingston vs. Ten Broeck*, 16 Johns. 22; *Atty. Genl. vs. Parker*, 8 Atk. 576; *Atty. Genl. vs. Foster*, 10 Ves. Jr. 338; *Weld vs. Hornby*, 7 East. 199; *Rex vs. Osborn*, 4 East 327; *Doe vs. Ries*, 8 Bing. 181 *per Tindal, C. J.*) Upon this principle we are permitted also to look at the undisturbed use of the right contested, on the one side, and the unqualified acquiescence, on the other, down to the time of the plaintiff's purchase of the premises in 1837; and these circumstances are also justly entitled to weight in the construction of this reservation.

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I therefore come to the conclusion that the unqualified right to use the water of the Normanskill for milling purposes upon the premises of the defendant, was reserved in the deed of 1829. And that being so, it followed, that the right to flow so much of the land conveyed by that deed as was necessary for the reasonable and full enjoyment of the reservation, was also reserved. This reservation should be construed in the same way as a grant by the owner of the soil of a like privilege; for the rule is, that what will pass by words in a grant will be excepted by the same words in an exception. (*Shephard's Touchstone*, 100, 1 *Saunders*, 326, n. 6; *Doud vs. Kingscote*, 6 *Mees. and Wels.* 197; *Hinchliffe vs. Kennard*, 5 *Bing. N. C.*) Now if Abel French, Sen., who owned the premises of both parties when the deed of 1829 was executed, had then conveyed the premises of the defendant below with "all the creeks, kills, runs and streams of water," the right to the beneficial enjoyment of the dam, mills and privileges, situated on those premises would have passed by such conveyance, as a necessary incident to the subject matter actually granted, although not specifically named. (*Shephard's Touch.* 89, *Bac. Abr. Title Grant*, 1. 4.; *Price vs. Braham*, *Vaughan's Rep.* 109.) Upon this principle if a man having a close to which there is no access except over his other lands, sell that close, the grantee shall have a right of way to it, for without it he cannot derive any benefit from the grant. So if the grantor should reserve that close to himself, and sell his other lands, the law will presume a right of way reserved. (*Howton vs. Freccusson*, 8 *Term Rep.* 50; *Holmes vs. Goring*, 2 *Bing.* 56; *Clark vs. Cogge*, *Cro. Jac.* 170; *Jorden vs. Atwood*, *Owen Rep.* 121; *Nickols vs. Luce*, 24 *Pick.* 102, 1 *Saund.* 323, n. 6; *Collins vs. Prentice*, 15 *Conn. R.* 89, 3 *Kent. Comm.* 421, 422, 5th *Ed.*) The way in the one case is granted by the deed, and in the other case reserved. And although it is called a way of necessity, yet in strictness the necessity does not create the way, but merely furnishes evidence of the intention of the parties.—For the law will not presume an intent that one of the parties should convey land

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to the other in such a manner, that the grantee can derive no benefit from the conveyance, nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. Under such circumstances the law will give effect according to the *presumed intent* of the parties. The sound and reasonable rule is, that whatever is necessary to the fair enjoyment of the thing granted or excepted, is incidentally granted or excepted. (*Liford's Case* 11, *Coke*. 52; *Doud vs. Kingscote*, 6 *Mees. and Wels.* 174; *Hodgson vs. Field*, 7 *East*. 613.)

In the case before us, French, the grantor in the deed of 1829, when he conveyed the premises overflowed, to Van Auken, the plaintiff's grantor, retained to himself the premises below on the same stream, and he expressly reserved the stream itself, by the phrase "all creeks, kills, runs, and streams of water." On the premises not granted he possessed mills, which would become worthless, if the reservation is to be construed so as to apply only to the stream in its natural course. Under these circumstances I cannot doubt that the phraseology employed by the parties was intended to indicate the stream in the condition it then was, and to reserve it for the uses to which it was then, and had been applied. And in adopting this construction, I do not think we do any violence to the language in which the parties chose to express themselves.

I am of opinion that the judgment of the Supreme Court should be reversed, and a *venire de novo* issued by that Court.

GARDINER, J. The main question in the cause, is as to the true meaning and effect of the conveyance from Van Auken to the plaintiff, or which is equivalent thereto, the effect of the deed from Abel French, Sen., to Van Auken.

The *reservations, conditions, and covenants* contained in the lease from Ten Broeck to Bullock, are made parts of the deed from A. French, Sen., to Van Auken, and of the latter to the plaintiff, and must be construed as I apprehend in the same manner as if the language of the lease in these particulars had been incorporated into those deeds respectively.

Such is the legal inference from the reference in those deeds to the lease in question, (4 *Wend*, 374.) and the obvious import of the terms adopted by the parties.

The premises are conveyed to Van Auken, "subject to a rent of five bushels of wheat, one third part of a load of wood, and to such other covenants, reservations, and conditions, as are mentioned in the deed to Ten Broeck." The reservations as to the rent and wood are placed upon the same footing with the covenants, conditions, and reservations in the lease, and are all adopted by the parties in *presenti*, as parts of the contract then made.

The exception in the lease above mentioned is in the following words: "Saving and always excepting to the said parties of the first part, out of the present grant and release, all mines and minerals that now are or may be found within the premises hereby granted and released, and all the creeks, kills, runs and streams of water." If the exception had stopped here, there probably would be no difference of opinion as to its construction. Two distinct subjects, mines and water are referred to, and both are excepted by the same general terms from the operation of the grant. The exception then proceeds to a new subject,—“and so much ground within the same premises, as the grantor may think requisite and appropriate at any time hereafter, for the erection of works and buildings for the working of said mines; also such wood and timber, as they may think proper for the working said mines, with liberty to dig through and use the ground for either of said purposes, to pass and repass with horses, &c., through the premises and lay out roads therefor.” The latter clause of the exception above quoted, unquestionably refers to mines as the principle subject with which they are connected, and to which they are limited. The language is, so much ground, also such wood, as may be thought necessary for mining purposes.” But it is not perceived how this in the slightest degree qualifies or restricts the previous general exception as to the creeks, streams, &c. The language of the exception in reference to the latter, is not “so much of the

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creeks, kills, runs and streams of water," are excepted as the grantor or his assigns may think requisite and appropriate for mining purposes, or any other special object; but all creeks, &c., without limitation of any kind, are reserved absolutely. In confirmation of this view, we find another clause of the deed by which it is made a condition of the grant, that neither the grantee nor his assigns "do at any time hereafter erect or permit or cause to be erected, any mill, or mill dam upon any creek, kill, or river, or stream of water, within the said premises." The condition it will be perceived is as broad as the right reserved, if that extended to all the creeks, streams, &c., but it is not in harmony with the construction of the Supreme Court, which limits that right to such *use* of the water as may be deemed requisite for mining purposes.

We may ask why prohibit the grantee from the use of the water not reserved to the grantor, and therefore, of no value to him?

The answer given by the learned Judge, who delivered the opinion of the Supreme Court is, that the lessors or their friends might have claimed a monopoly of the milling business. This is certainly a substantial reason why the grantor should reserve *all the water*, but not a very satisfactory explanation why the *condition* should be more extensive than the *exception*. I feel great confidence, therefore, in the opinion, that the construction given to this part of the grant by the defendant below, is the correct one, and that the Circuit Judge erred in refusing to charge as requested, "that the reservation in said deed of "all creeks, kills, streams and runs of water," was an absolute reservation of the same for any and every purpose."

It was argued that the conveyance from French to Van Auken, reserved no right to flow any part of the lands conveyed, and must, therefore, be deemed absolute, and the grantor was thereby divested of all right to flow the premises in question.

We have attempted to show that the reservation in the lease from Ten Broeck to Bullock, of "all creeks, kills, runs and

streams of water," was unqualified. To what did the parties suppose these terms to relate in 1829, when the deed from French to Van Auken was executed? To the state of the stream as it was at the time of the conveyance? or as it had been in 1793, the date of the lease to Bullock? Their intention is to be collected from the conveyance itself, and the attending circumstances.

And first, none of the words of the reservation above quoted have any *definite legal* meaning.

A creek, according to Webster, sometimes signifies a small bay, inlet, or cove, and more generally in this country, a small river. Kill, is a Dutch word, signifying a channel or bed of the river, and hence the river or stream itself. A stream, means a river, brook, or rivulet, any thing in fact that is liquid and flows in a line or course.

It is presumed that a creek or stream does not cease to be such, merely because its course may be opposed by some obstruction whether natural or artificial. They do not cease to be streams, because in consequence of such obstruction their water may be deepened or flow with a diminished velocity. They would still flow, and the same quantity would pass any given point in its channel in the same time, and they would continue in common parlance to be designated by their former names.

The language of the reservation is therefore equally applicable to the condition of the stream as it was in 1829, or in 1793.

In the second place, the circumstances attending the conveyance point to the former period exclusively. The legal presumption is that the parties were upon the land when the conveyance was executed to Van Auken. (2 *Phillips Ev.* 8 *Lond. ed.*, 731; *Cowen and Hill's notes*, 2 *part*, 1399.)

Let us assume therefore, what is substantially proved, that prior to the sale in 1829, to Van Auken, French had taken the former to the premises, and pointed out to him the dam, and its effect upon the stream, that it caused the water to set back one mile or more; to overflow a part of the premises he

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was about to purchase, and the use to which the water was applied; and had then said to him in the language of the deed, I "except and reserve all this creek, kill, stream, or run of water, and you are prohibited from erecting or permitting or causing to be erected any mill or mill dam thereon, and you agree that you will not give or cause to be given any manner of let or obstruction whatsoever to my prejudice in the *full enjoyment* of the rights, titles, and privileges saved to me by the saving and exception aforesaid."

I do not say that the grantee was bound so to understand, but it seems to me that he might naturally infer, that the reservation of the grantor, applied to the stream as it then was, and not as it would be if the dam was removed.

The phrase "full enjoyment" for which the grantee covenants, is to be taken distributively, and applied as well to creeks and streams as to mines. This follows necessarily, if it be admitted that the reservation of the former was absolute, and if this be granted, it is difficult to explain how the grantor, having reserved the stream, was to enjoy the privilege saved to him without the use of the water. Of course the proper exercise of the privilege was a question of fact for the jury. In *Provost vs. Calder*, (2 *Wend.* 517.) the exception in the deed was as follows:—"Excepting and reserving to myself, &c., the sole and only right of the stream of water running through the land demised, and the party of the second part is not to erect or build any kind of water works on said stream or creek, but the same I hereby reserve to myself as aforesaid." It will be seen that the exception and prohibition are almost in the terms of the one under consideration. In the last clause, "the same I hereby reserve to myself as aforesaid," the immediate antecedent of "same" is, creek or stream, and the reservation to which the word "aforesaid" applies, was of the water, not of the right to build water works, a right not in terms reserved to the grantor, but which the grantee was prohibited from exercising. The Court, however, looking to the intention of the parties very properly determined that the right to erect water works on

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the lands granted was reserved. If we substitute the covenant of Van Auken in this case, for the last clause of the exception in the case cited, the sentence would read thus: "Excepting, &c., and the party of the second part is not to erect or build any kind of water works on said creek, but he hereby agrees not to give or cause to be given any manner of let or obstruction to said grantor in the full enjoyment of the right and privilege saved to him by the saving and exception aforesaid." If the exception in *Provost vs. Calder*, was properly adjudged to reserve the land, the covenant above referred to taken in connection with the prohibition and reservation, must be sufficient to reserve a mere easement. It is true, a lease was taken in that case, and the circumstance is adverted to as evidence of the understanding of the parties. In this also, we have the fact that Van Auken occupied the land for ten years, without objecting to the dam or the flowing of his premises. The evidence of a practical construction is as strong in the one case as the other.

Upon the ground therefore first, that the reservation of all creeks, streams, &c., in the lease of 1798, was absolute, and second, that by the true construction of the conveyance from French to Van Auken, the right to flow the premises for milling purposes, to the extent that they had been previously, and were at the time of the conveyance, overflowed, was reserved by the grantor, the judgment of the Supreme Court should be reversed, and *venire de novo* issue.

JOHNSON, J. The deed from French to Van Auken, executed in 1829, is to be read and construed as though the reservations and conditions of the original lease were inserted in it, and were part and parcel of the language of the instrument. We are then to look at the whole instrument and give it such a construction as shall give full force and effect as far as possible to the grant and reservations according to the sense in which it was mutually understood and relied upon by the parties at the time. The question to be determined is, whether the Normanskill was intended by the parties to be

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reserved for the working of mines merely, as assumed by the Supreme Court? It is to be observed that the phrase "mining purposes" used throughout by the Circuit Judge, the Supreme Court, and Counsel for the plaintiff below, is not to be found in the deed. The language there employed is "working mines." By referring to the reservations it will be seen that there is a reservation of "so much ground within the same premises," as the grantor, his heirs and assigns might think necessary "for the erection of the works and buildings, for the convenient working of the said mines." Wood, firewood, and timber are also reserved "to use in building, repairing, accommodating and working said mines." But it nowhere appears that the grantor contemplated using the water-power in working the mines whenever or wherever they might be found, or putting it to any other use than he was making at the time of the grant and reservation. Indeed it is quite as difficult to perceive how the stream could be used to the least advantage for working mines," as it is to believe that French intended to grant to Van Auken the right to destroy his mill and dam immediately below, and only to reserve its use for this visionary and utterly impracticable service. Working mines consists mainly in excavating, draining, and raising ore; a service performed by miners, and entirely distinct and separate from the business of smelting ores and forging metals, where water or steam-power is necessarily employed. Again, look at the condition. If the grantor intended only to reserve the streams, &c., for mining purposes, why not prohibit the grantee from erecting works to work mines? Why confine the prohibition to mills and mill dams? and that too under a penalty so stringent and sweeping as the forfeiture of the whole estate, unless he supposed he had by the reservation secured the use of the water for such purposes to himself.

The learned Justice who delivered the opinion of the Supreme Court, advertng to this condition in the deed or lease, says: "The lessors or their friends might have claimed a monopoly of the milling business for the neighborhood, and the condition might have been inserted to secure that." I

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think it quite obvious that such was the object of inserting this condition. But how was that object to be secured? Surely not by reserving the water merely for working mines! The construction of the Supreme Court shuts up the stream forever for milling purposes, unless these conflicting titles shall again chance to unite in the same person; and whatever may be its capacity for useful employment, or the wants and necessities of the public, it can only be brought into requisition on the discovery of a mine, in some location where hydraulic power may be "conveniently" tasked in excavating, and raising ore or other mineral substance to the surface.

This construction seems to me as much at war with all sound legal rules of interpretation as it is with a judicious public policy. I think we shall best give effect to the spirit, and intent of the instrument and the intentions of the parties by holding that in judgment of law, the grantor reserved the right to use the water as he was then using it, and as it had been used long antecedent to the reservation; and that we are bound to presume such to have been the intentions, unless it is limited and conferred to some other or different use by express and unequivocal terms.

But it is said that if the reservation of the stream is absolute and not limited to working mines merely, still the defendant below has no right to maintain his dam or flow the land of the plaintiff below beyond the ancient and natural bed of the stream. This would be so, if at the time of the grant the stream flowed in its ancient and natural channel, and there was nothing in the reservation to show the purpose for which it was reserved. Here, however, it was different. At the date of this grant, and for a long time prior to that, the defendant's mill-dam had been established, and if we are to believe the testimony of the witnesses, French and Van Auken flowed the water upon the premises in question, as high as it was at the commencement of this suit, and so continued without objection up to the time of the plaintiff's purchase, in 1837. As far back as 1793, as appears by Ten Broeck's deed, the stream was used for a saw-mill, and it might be a

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task of no little difficulty at this day to discover the ancient bed of the stream upon the premises in question.

I think there cannot be a reasonable doubt that the reservation in Van Aukin's deed, was a reservation of the use of the stream, as its use and flow were then established, and that it was so understood, and intended by the parties. The reservation and the condition, taken together, fully justify such a conclusion. In *Provost vs. Calder*, (2 *Wend.* 517.) the reservation was "the sole and only right of the stream of water running through the above demised piece of land, and the party of the second part is not to erect or build any kind of water-works whatsoever, on said stream of water or creek, but the same I hereby reserve to myself as aforesaid," and this the Court held to be a reservation of the right to use the water power upon the land. In that case, as in the one before us, it will be seen that there was only a reservation of the stream coupled with a provision that the other party should erect no water-works upon it. The cases of *Burr vs. Mills*, (21 *Wend.* 290, and 6 *Connecticut*, 289,) relied upon by the plaintiff's counsel, are cases of a conveyance without any reservation, and are not in point. Here there is a reservation of a stream which the party was then using, coupled with an absolute prohibition of the same use to the other party, and the only question is, as to the nature, purpose, and extent of the reservation. I am of opinion that the Judge erred in the construction of the reservation in the deed, and that the judgment should be reversed.

JONES, J. and WRIGHT, J., concurred in the result of the preceding opinions.

BRONSON, J., delivered an opinion in favor of affirming the judgment, with whom RUGGLES, and GRAY, Js., concurred.

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COGGILL vs. THE AMERICAN EXCHANGE BANK.

One of two partners drew, in the name of his firm, a bill upon the plaintiff, payable to the order of B, and having forged the name of B as endorser upon the bill, presented it to the Bank of Central New York, had it discounted in the regular course of business, and applied the proceeds to his private use. The Cashier of the Bank endorsed the bill and transmitted it to the defendants for collection, and the plaintiff accepted and paid it to the defendants. After discovering that the payee's endorsement was forged, he sued to recover back the money so paid. *Held*, that the action could not be maintained.

B, the payee, being a stranger to the transaction, and having no interest in the draft, his endorsement was not necessary in order to transfer a good title to the party discounting the paper, or to entitle such party to receive the money upon it.

The plaintiff, having accepted and paid the bill under these circumstances, would have a right to charge the amount against the funds of the drawers in his hands, or, if there were none, to maintain an action against them for money paid to their use.

The case of *The Canal Bank vs. The Bank of Albany*, (1 Hill 287,) commented upon and approved; but distinguished from this case, inasmuch as there, the endorser whose name was forged, was the owner of the draft, and the only person entitled to receive the money upon it. *Per* BRONSON, J.

It seems that the drawers, after having passed the draft with the payee's name endorsed upon it, and received the avails of it in an action against them, would be estopped from controverting the genuineness of the endorsement.

Where a bill is put in circulation by the drawer, with the endorsement of the payee forged upon it, a *bona fide* holder may treat it as a bill payable to bearer. *Per* BRONSON, J.

ERROR to the Supreme Court, where Coggill sued the American Exchange Bank in assumpsit, to recover back the money which he, as the drawee and acceptor, had paid to the bank as the holders of a bill of exchange, upon which the name of the payee had been forged. The case was this; Shapley and Billings were partners in business at Earlville, Madison county, and the plaintiff resided and did business in the city of New York. On the 28th of July, 1843, Charles S. Billings, one of the partners, drew a bill in the name of the firm, on the plaintiff, for \$1,500, payable to the order of Truman Billings, ten days after sight. Charles S. Billings forged the name of Truman Billings, as endorser on the

1	113
140	560
1	113
159	486
159	469

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draft, and also the name of Truman Billings, Junior; and with those names upon the bill, presented it to the bank of Central New York, at Utica, for discount, on the 29th of July; and the bank discounted the bill and paid the money to Charles S. Billings. The discount was made in the usual course of business, the bank having no knowledge of the forgery, nor any reason to suppose that Billings was not acting, as he professed to do, for his firm, though in point of fact he applied the money to his own private use. The bank endorsed the draft, and sent it to the defendants for collection. The plaintiff accepted the bill, and paid the same at maturity, on the 12th of August, to the defendants. The plaintiff had no funds of the drawers in his hands, but accepted and paid the bill for their accommodation, in pursuance of an agreement made with Charles S. Billings to do so. Charles S. Billings absconded, about the 7th of August, on account of this and other forgeries. On learning that the names of the endorsers had been forged, the plaintiff, on the 18th of August, called on the defendants to refund the money, and then brought this action to recover it back. On the trial, the Circuit Judge charged the jury that the plaintiff was not entitled to recover, and the plaintiff excepted to his opinion. The jury found a verdict for the defendants, which the Supreme Court refused to set aside, and rendered judgment for the defendants. The plaintiff brings error.

B. D. Noxon and J. Van Buren, (Atty. Genl.) for plaintiff in error.

J. A. Spencer, for defendants in error.

Points for plaintiff in error:

I. The endorsement of the name of the payee being forged, the defendant had no title to the bill, and the payment was therefore made without consideration, and under a mistake of fact. (*Canal Bank vs. Bank of Albany*, 1 Hill 289; *Talbot vs. Bank of Rochester*, *ib.* 295; 6 Barn. and Cress. 671; 9

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ib. 902; 9 *D. & R.* 781; 5 *ib.* 408; *Ch. on Bills*, 430, 198, 265; 4 *T. R.* 28; 1 *H. Bl.* 607; 1 *Car. & Payne* 297; *Doug.* 638.)

II. The plaintiff, by his acceptance of the draft, contracted to pay to the order of Truman Billings, and being an accommodation acceptor, he may insist on the letter of his contract.

III. Had the plaintiff refused to pay the bill, the defendant could not have compelled him, inasmuch as he could not make title through a forgery.

IV. The acceptance of the bill was no admission of the genuineness of the endorsements. The Central Bank, on the other hand, by endorsing the bill before it was accepted, guaranteed the genuineness of the previous endorsements, and thus gave them credit with the plaintiff, and it should not now be permitted to take advantage of its own wrong.

V. The plaintiff has no remedy over against the firm of Shapley and Billings, the drawers.

Points for defendant in error :

I. Truman Billings, the payee, never had any interest in the draft, and therefore his endorsement was not necessary to pass the title to the Bank of Central New York. The bank, by receiving it from Shapley and Billings, the drawers, became the owner, and had the right to receive the money upon it. (*Ch. on Bills* 220, 9th *Am. from the 8th London ed.*; *ib.* 178; 2 *Bailey Rep.* 547; 5 *Greenl. Rep.* 282; 13 *Mass.* 304.)

II. As between the drawers and acceptor, the bill is to be regarded as payable to the drawer's order, or to the order of a fictitious person, or to the order of the Cashier of the Central Bank. (*Pletts vs. Johnson*, 1 *Hill* 112.)

III. The plaintiff, as acceptor, had no interest in the endorsements, and no remedy upon them. He stands as the maker of a note, and the bank alone was interested in having genuine endorsers. (*Ch. on bills* 267, *same ed. as above*;

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Griffin vs. Rudd, 21 Wend. 502, 504; *Suydam vs. Westfall*, 4 Hill 211, 217.)

IV. The plaintiff is not liable to Truman Billings, the payee, for the money upon this draft. Truman Billings having no interest in the draft, has no claim to recover upon it. The case, therefore, does not come within the reason of the rule which allows an acceptor, who has paid the draft upon the faith of a forged endorsement, to recover it back.

BRONSON, J. In an action against the drawee of a bill, it is not enough for the holder to prove that it has been accepted, without also establishing his title to the bill. And if the acceptor, under a mistake as to the fact of ownership, has paid the bill to one who had no title, the money may be recovered back, although it was paid to a bona fide holder. (*Canal Bank vs. Bank of Albany*, 1 Hill 287.) The plaintiff relies upon this case as not being distinguishable from his own; but he is under a great mistake. It is not expressly stated in the report of that case, that Bentley, the payee named in the draft, was the owner of it; nor was it necessary that the fact should be stated, for where nothing appears to the contrary, the payee must be taken to be the owner. It may, however, be proper to mention, that it did expressly appear that Bentley was the owner of the draft. My recollection on the subject has been confirmed by inquiries made since the argument. In the case now before us, the fact is fully established, that Billings, the payee named in the bill, never was the owner of it; nor was it drawn with the intent that he should either endorse it, or have any interest in, or concern with it. In the one case, the payee owned the bill, and could have maintained actions upon it, both against the acceptors and the drawers; while in the other, the payee has no interest in the bill, and cannot maintain an action upon it, for his own benefit, against any one. In the one case, payment to the holder of the bill would be no protection against an action by the payee, because he was the true owner; while in the other, the payee, having no title, could in no event have a

legal claim to the money. The distinction between the two cases, is very material and is quite too obvious to be mistaken by any one.

Although the payee, Billings, had no interest in the bill, the question still remains whether the Bank of Central New York, in whose place the defendants stand, acquired a good title to it. We think they did. Shapley and Billings drew the bill, and passed it to the bank, with the name of the payee endorsed upon it. By that act they plainly affirmed that the endorsement was genuine, so that the bill might be negotiated by delivery. By means of this representation they induced the bank to discount the bill; and if the bank had brought an action upon it against them, counting in the usual form, as upon a bill payable to Truman Billings, and endorsed by him, the drawers would, upon the plainest principles for maintaining honesty and fair dealing, have been estopped from controverting the genuineness of the endorsement. If an authority is needed in support of this doctrine, *Meacher vs. Fort* (3 *Hill So. Car.* 227, and *Riley's Law Cas.* 248,) is a case directly in point.

There is another form of declaring in which the bank might have recovered on the bill. As the payee had no interest, and it was not intended that he should ever become a party to the transaction, he may be regarded, in relation to this matter, as a nonentity; and it is fully settled that when a man draws and puts into circulation a bill which is payable to a fictitious person, the holder may declare and recover upon it as a bill payable to bearer. (*Vere vs. Lewis*, 3 *T. R.* 182; *Minet vs. Gibson*, *id.* 481, and 1 *H. Black*, 569, S. C. in the House of Lords; *Collins vs. Emett*, 1 *H. Black*, 313; *Plets vs. Johnson*, 3 *Hill* 112.) In legal effect, though not in form, the bill is payable to bearer; and it is always good pleading to state the legal effect of the contract. It is said in some of the cases, (and see *Bennett vs. Farnell*, 1 *Camp.* 130, and 180, *b. note*,) that when the action is against the acceptor of such a bill, it must appear, that he knew the payee was a fictitious person. But I can see no sufficient reason for

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laying down such a rule. It is enough that the holder has a good title to the bill, so that the acceptor on paying it, can properly charge the amount against the funds of the drawer in his hands, if there be any; and if there be none, that he may have an action against the drawer for money paid to his use. As the acceptor can never resort to the payee or endorser, he has no interest in knowing through whose hands the bill has passed, except for the purpose of ascertaining that the holder has a good title.

It may be well enough, by way of discouraging such transactions, to hold, that one ~~who discounts~~ a bill for the benefit of the drawer, with knowledge of the fact that the payee is a fictitious person, cannot recover against the acceptor. (*Hunter vs. Jefferey, Peake. Add. Cas.*, 146.) But that doctrine has nothing to do with this case; for the bank had no knowledge or suspicion at the time the bill was discounted; that the name of the payee had been forged.

The point has been adjudged, that when the maker of a promissory note puts it into circulation, with a forged endorsement of the name of the payee upon it, a bona fide holder may sue and recover against the maker as upon a note payable to bearer; (*Fort vs. Meacher, Supra.*) and the same rule has been applied where the payee had no interest in the note, and it was not intended that he should become a party to the transaction. (*Foster vs. Shattuck, 2 N. Hamp.* 446.) Notwithstanding what was said in *Dana vs. Underwood*, (19 *Pick.* 99.) I think this sound doctrine; and it is applicable to the case, of a bill put into circulation by the drawer with a forged endorsement upon it. A bona fide holder may treat it as a bill payable to bearer.

The bank had a good title to the bill as against the drawers, and the payee; and that was a good title against all the world. No one is injured by this doctrine. The bill has answered the end for which it was drawn. The plaintiff has paid money for the drawers in pursuance of their request; and he has the same remedy against them that he would have had if the endorsement had been genuine.

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I have spoken of the drawing and negotiating the bill as the act of both of the partners, although only one of them was present at the time, because such was the legal effect of the transaction. It is said that Charles S. Billings was not the agent of his partner Shapley for the purpose of committing a forgery; and that is very true; but his right to draw and negotiate bills in the name of the firm has not been questioned; and that is all that is material to the present inquiry. Is it not important to know who put the name of Truman Billings as endorser upon the bill. It is enough that Truman Billings was not the owner of the bill, and that it was passed to the bank with his name upon it.

As the bank discounted the bill for the firm of Shapley and Billings, it is of no importance that Billings applied the money to his own private use, instead of carrying it into the affairs of the partnership. And in relation to the estoppel, it is quite clear that the declarations and acts of one of the partners, made and done while transacting the partnership business, and relating to it, are equally conclusive upon both of them. We have not been referred to any book which holds a different doctrine.

The plaintiff probably accepted and paid the bill under the mistaken assumption that the endorsement was genuine. But he was not mistaken about the main fact which he was concerned to know, which was, that the holder was the owner of the bill. Having paid the money to the proper person, the plaintiff has all the rights against the drawers which he would have had if the endorsement had been made by Truman Billings; and there is no principle upon which this action can be maintained.

Judgment affirmed.

HOES, and MARY, his wife, and HAGER, and ANNA, his wife,
Appellants, vs. JOHN M. VAN HOSEN, Respondent.

The general rule is that the personal estate of a testator is the primary fund for the payment of legacies, and a testator is presumed to act upon this legal doctrine, unless a contrary intent is distinctly manifested by the terms and provisions of the will.

Where the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisees in such a case will be deemed in aid, and not in exoneration of the primary fund.

A testator gave to his wife the use of his real and personal estate during her widowhood; to two of his sons he devised the reversionary interest in his real estate, and directed them to pay legacies to his other son and to his daughters; but made no disposition of the reversionary interest in the personal estate; *held*, that such reversionary interest in the personal estate was the primary fund for the payment of the legacies.

This was an appeal by the complainants from a decree of the Chancellor, reversing that of the Vice Chancellor of the third Circuit, and directing the complainants bill to be dismissed with costs. The facts are sufficiently stated in the opinion of Chief Justice Jewett. (*See also*, 1 *Barbour, Ch. Rep.* 380.)

H. Hogeboom, for appellants.

A. L. Jordan, for respondent.

JEWETT, CH. J. The testator, on the 17th day of September, 1817, duly made his last will and testament, and on the same day died, leaving a widow and six children. At the time of his death, his property consisted of a farm of about 190 acres, worth about \$9,500, of farming utensils and stock thereon, worth about \$848 06, of choses in action and other personal estate, worth about \$5,827 65. At the time of his death,

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his debts owing by him amounted to about \$144 55, and his funeral charges to \$59 33.

To his two sons John and George, he devised and bequeathed all of his farm of land, with all thereto belonging, with his house, barn, &c., their heirs and assigns forever, share and share alike, with all of his farming utensils, and also, all his stock of whatever nature then on his farm; to his son Lambert he bequeathed, three thousand dollars, to be paid within one year after his decease, by his two sons, John and George; to each of his three daughters, Mary, (called Dorothe,) Anna and Jane, he bequeathed the sum of seven hundred dollars, also to be paid by his said two sons, John and George, as they severally should become of age.

To his wife Dorothe, he gave the use and income of all his *estate during her widowhood*. He appointed his wife executrix, his son John and his brother George executors, and made no other disposition of his personal estate.

The two executors proved the will and took out letters testamentary. The executrix did not qualify as such; George, one of the executors, died in 1822, leaving the son John sole executor, who soon after the testator's death made an agreement with the widow, by which he took the possession of the entire estate and used and occupied the same, for his own benefit and that of his brother George, until the year 1825, when he purchased his brother's interest in said estate.

The debts and legacies were paid by John out of the testator's personal estate. The widow died in 1834.

The complainants now claim an account of the reversionary interest in that part of the personal estate not specifically bequeathed to the two sons John and George, and payment of their shares therein as next of kin of the testator.

This claim is resisted upon two grounds, first, on the ground, that such reversionary interest was the primary fund for the payment of the legacies, after the debts were paid and by which it was exhausted. Second, on the ground that Maria before her marriage and Hager after his marriage with Anna, respectively released their claims to the defendant.

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As to the first ground: It is a rule in the construction of wills that the intention of the testator should govern in all cases, except where the rule of law overrules the intention; and this intention, it is well settled, must be collected from the whole of the will or writing itself. (*Bradley vs. Leppingwell*, 3 Burr. 1541; *Evans vs. Astley*, 3 Burr. 1581.) The personal estate of the testator is deemed the natural and primary fund to be first applied in discharge of his personal debts and general legacies, (*Toller L. of Ex.* 417.) and the testator is presumed to act upon this legal doctrine, until he shows some other distinct and unequivocal intention. (1 *Story's Eq.* § 573.) It is a rule also that, in the event of a deficiency of assets to pay the debts of the testator, payable out of the personal assets, and discharge the specific and general legacies, the latter must abate in proportion to the deficiency, or be lost altogether, unless the real estate is charged with their payment.

The old law was, that the personal estate could not be exempted from the payment of debts and legacies without express words; but this is now admitted not to be necessary; and it is sufficient, if there appears upon the will an "evident demonstration," a "plain intention," or a "necessary implication." (*Gittins vs. Steele*, 1 Swanst. 25; *Watson vs. Brickwood*, 9 Vesey, Jr., 447; *Booth vs. Blundell*, 1 Meriv. 192, S. C. 19 Vesey, Jr., 517; *Kelsey vs. Deyo*, 3 Cow. 133; *Tole vs. Hardy*, 6 Cow. 333; *Glen vs. Fisher*, 6 John, Ch. 33; *Livingston vs. Newkirk*, 3 John, Ch. 319.) What shall constitute proof of such an intended exemption by the testator is not in many cases ascertainable upon abstract principles; but must depend upon circumstances—and different Judges have held different opinions. Lord Thurlow thought it was a point so slender and fine that he could not collect any certainty upon the question. (*Ancaster vs. Mayer*, 1 Brown's Ch. R. 462.) And Lord Eldon, (in *Booth vs. Blundell*, *Supra.*) remarks, "it is scarcely possible to find any two cases, in which the Court altogether agrees with itself; there being hardly a single circumstance, regarded in one, as a ground of infer-

ence in favor of the intention suggested as belonging to that particular will, that is not in some others treated as a ground against that intention."

What then was the intention of the testator, plainly collected from the whole will in respect to the fund out of which the legacies were expected or required to be paid? Was it, that these legacies should be paid by his sons, John and George *personally*, in consideration of the devise of the real estate and bequest of the farming utensils and stock on his farm in remainder after the death or re-marriage of his widow to them, in *exoneration* of the reversionary interest in the personal estate undisposed of by his will? Or was it that such devise and bequest to the two sons with directions to them to pay, should be in *aid* of the reversionary interest in that personal estate, and that that interest should be the primary fund for the payment of the legacies?

There is no express charge of the legacies upon the estate given to John and George *in exoneration* of the reversionary interest in the personal estate not specifically bequeathed; nor can any such charge be implied, if the testator is presumed to have acted upon the doctrine that his personal estate was the primary fund for the payment of his legacies: yet it is clear that the testator intended that the legacies should in no event fail or abate, and therefore, by his direction that John and George should pay such legacies, evidently in consideration of his bounty to them, he not only created a charge upon them personally, but in equity, a charge upon the estate bequeathed and devised to them.

The mere making of a provision for the payment of debts or legacies out of the real estate, does not discharge the personality. There must be an intention not only to charge the realty, but to *exonerate* the personality; not merely to supply another fund, but to substitute that fund for the property antecedently liable. Thus in numerous cases, it has been held that neither a charge of debts on the testator's lands *generally*, or on a specific portion of them, nor a devise upon trust for sale, however formally or anxiously framed, nor the crea-

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tion of a term of years for the purpose of such charge, will exonerate the personalty. (*White vs. White*, 1 *Vernon* 43; *Bridgman vs. Dove*, 1 *Atk.* 103; *Lord Inchiquin vs. French*, 1 *Cox.* 1; *Hancox vs. Abbey*, 11 *Vesey*, 186; *Tower vs. Lord Rous*, 18 *Ves.* 132; *Ancaster vs. Mayer*, 1 *Brown, Ch. R.* 454, *Ram. on Assets, Ch. 3*, § 5; 2 *William's Exrs.* 2 *Am. Ed.* 1215.)

Nor is it material that the charge is imposed on the devisee in the terms of a condition, as where real estate is devised to A. he paying the debts and legacies or the like. (*Bridgman vs. Dove*, 3 *Atk.* 203; *Mead vs. Hide*, 2 *Vernon*, 120; *Watson vs. Brickwood*, 9 *Vesey, Jr.*, 447, *Roper on Leg.* 163.)

In all these cases, the charge upon the realty, or the condition that the devisee shall pay as directed, is deemed and taken to have been made in *aid* of the primary fund, and not in *exoneration* of it, unless there is an *absolute* disposition of all the personal estate of the testator; in such case, the intent of the testator to charge the realty in exoneration of the personalty, is sufficiently manifested. In this case there was no disposition of the *reversionary* interest in more than \$5,000 value of the personal estate.

I am satisfied, therefore, upon this branch of the defence, that the Chancellor came to a correct conclusion.

It is however insisted, that assuming that the legacies were to be paid out of the reversionary interest in the personal estate not bequeathed to the devisees, the Chancellor, instead of dismissing the bill, should have directed an account of this property to be taken to ascertain whether the debts and legacies would exhaust it—in the event that it should be held that the releases were inoperative beyond the amount of the legacies of the releasors. If the case was such that it could not be seen, without a reference, that they would exhaust it, an account in the event mentioned should be taken. But there is no room for any doubt upon that question. The widow died in June, 1834. Until then she was entitled to the use and income of the personal estate. The reversionary interest of that portion not specifically bequeathed to John and George,

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amounted to \$5,827,65. The legacy to Lambert alone, with interest after the expiration of one year from the death of the testator, to which the defendant would be entitled to be allowed, without any account of the three legacies to the daughters, of \$2,100 in the aggregate, and without the debts and the interest on each from the time the same were payable, greatly exceeds the value of that personal estate. There is not the least ground appearing in the case rendering it proper or necessary for such reference.

Being entirely satisfied of the soundness of the defence upon the first ground, I do not deem it necessary to examine the other. I am of opinion that the decree of the Chancellor should be affirmed.

Decree affirmed.

SCHERMERHORN, Appellant, vs. THE MOHAWK BANK Resp'ts.

Where a bill was regularly taken, as confessed in the Court of Chancery, and the Chancellor, on motion before him, refused to open the default, on the ground that the answer which the defendant sought to put in was not a good defence to the suit on the merits; *held*, that the decision of the Chancellor was not the subject of appeal.

J. Rhoades and *S. W. Jones*, for the respondents, moved to dismiss the appeal. The Mohawk Bank filed a bill against Schermerhorn and others to set aside certain assignments as being a fraud upon creditors. After the bill had been taken as confessed, the defendant, Schermerhorn, moved to open the default, and for leave to defend. The Chancellor denied the motion; and from that order the defendant has appealed. The case of *Fort vs. Bard*, decided in September last, is in point to show that an appeal will not lie.

A. Taber and *E. Sandford*, for the appellant, said there was a distinction between this case and the one cited. In *Fort vs. Bard*, the Chancellor denied the motion to open the

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default, on the ground that the defendant wished to set up an inequitable defence. But it was not so in this case. And this was not a mere question of practice. The Chancellor did not put his decision on the ground that the default had not been sufficiently excused; but he examined the case *on the merits*, and denied the motion on the ground that the facts on which we relied did not constitute a good defence. On that question we think the Chancellor erred; and in such a case an appeal should be entertained.

By the Court, BRONSON, J. There is no difference in principle between this case and the one cited at the bar. The motion to open a regular default is always a question of practice, addressed to the discretion of the Court in which the suit is pending; and it is not, in its nature, a proper matter for review in an Appellate Court. This is so, whatever may be the ground on which the motion was decided.

Appeal dismissed.

BRADY, Appellant, vs. DONNELLY, Executor, &c., Respondent.

The defendant to a bill in equity, put in a demurrer thereto, which was overruled by the Vice Chancellor. On appeal to the Chancellor, the order was affirmed. The defendant then appealed to this Court, and afterwards answered the bill. *Held.* that by answering, the appeal was waived.

Motion to dismiss appeal. The case was this: The bill was filed before the Vice Chancellor of the First Circuit, and the defendant Brady put in a demurrer thereto, which was overruled by the Vice Chancellor, with leave to file a second demurrer. The defendant appealed to the Chancellor, who, on the 26th of May, 1846, made an order affirming the decision of the Vice Chancellor, and from that order the appeal to this Court now in question was taken. In pursuance of the leave given, as above mentioned, the defendant, before the 26th of May, 1846, put in a second demurrer, which was also over-

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ruled by the Vice Chancellor in September, 1846. From this decision another appeal was taken by the defendant to the Chancellor, but the order so appealed from was affirmed by default in January, 1847. The appeal last mentioned not being made in such a manner as to stay proceedings, the complainant, on the 14th of December, 1846, had an order entered taking the bill as confessed. This order was opened by consent, and the defendant, in the same month of December, put in his answer fully denying the equity of the bill. A replication thereto was filed, and the cause proceeded upon the merits under the issue so joined. It appeared that after the answer was put in, the above appeal to this Court was noticed on both sides for hearing at two or more successive terms of the Court. The solicitor for the respondent, in his affidavit for the motion, stated, that until within a week he had not been advised of the impropriety of prosecuting the appeal after the defendant had answered the bill as aforesaid.

Charles O'Connor, for the respondent, insisted that by answering the bill the defendant had waived his appeal.

J. T. Brady, for the appellant.

After advisement, the Court (JONES and GRAY, Js., dissenting) held that the appeal was waived, and ordered the same to be dismissed.



CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW-YORK,
IN JANUARY TERM, 1848

DANKS vs. QUACKENBUSH.

The judgment of the Supreme Court in this case, determining that the act to extend the exemption of personal property from sale under execution, passed April 11, 1812, is unconstitutional and void as to debts contracted before its passage, *affirmed*.

On error from the Supreme Court. Danks sued Quackenbush in the Common Pleas of Onondaga County, in replevin for taking a horse and harness. The case was this:

In January, 1837, one Fitch recovered judgment against Danks in the Supreme Court, in an action upon contract, for \$83 85. In January, 1843, an *alias fieri facias* was issued on the judgment, and delivered to Quackenbush, who was a Deputy Sheriff, and who took the property in question by virtue of the execution; and for that taking the suit was brought. On the trial Danks claimed that the property was exempt from execution by the act of 1842, which enacts that, "in addition to the articles now exempt by law from distress for rent or levy and sale under execution, there shall be exempted from such distress and levy and sale, necessary household furniture, and working tools, and team owned by any person being a householder, or having a family for whom he provides,

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to the value of not exceeding one hundred and fifty dollars." (*Laws of 1842, p. 193.*) The necessary facts were shewn on the trial to bring the property in question within the exemption declared by this statute, provided the statute was to be so construed as to apply to debts contracted before its passage, and if such was the construction, then provided it was a constitutional and valid statute as to debts of that description. The defendant insisted that it did not apply to pre-existing contracts, and if it did, that it was so far unconstitutional and void. The Court charged the jury that the property was exempt, and the jury accordingly found a verdict for the plaintiff, on which judgment was rendered in his favor in the Common Pleas. Quackenbush having made a bill of exception embracing the above questions, removed the judgment by writ of error into the Supreme Court, where the judgment was reversed upon the ground that the act in question was unconstitutional and void as to antecedent contracts. (*See 1 Denio, 128, where the opinion of the Supreme Court is given at length.*)

A record of reversal being made up, Danks now brings error to this Court.

A. Taber, for plaintiff in error.

I. The statute in question makes no exception of executions for debts which had been *previously* contracted, and was evidently intended by the Legislature to apply to all executions levied after it went into effect. (*Sackett vs. Andross 5 Hill. 334.*)

II. Before the Court will declare an Act of the Legislature unconstitutional, a case must be presented in which there is no rational doubt. (*Dartmouth College vs. Woodward, 4 Wheaton's Rep., 625; Ex parte, McCollum, 1 Cow. Rep. 550.*)

III. The statute in question is not a "Law impairing the obligation of contracts," within the meaning of the Constitution of the United States. (*Bronson vs. Kinzie, 1 Howard*

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311; *McCracken vs. Hayward*, 2 Do. 608; *Sturges vs. Crowningshield*, 4 *Wheat*, 122.)

Geo. F. Comstock, for defendant in error.

I. The Act of 1842, extending the exemption of property from execution, cannot, consistently with settled rules, be so construed and applied as to affect pre-existing contracts. (*Gillmore vs. Shuter*, 1 *Freeman* 466. *S. C.* 2 *Mod.* 810; *Couch vs. Jeffries*, 4 *Burr.* 2460; 6 *Bac. Abr.* 370; 2 *Atk.* 36; 1 *Vesey, Sen.* 225; 2 *Ld. Raymond* 1850; *Osborn vs. Huger*, 1 *Bay Rep.* 179; *Ham. vs. Claws*, *ib.* 93; *Dash vs. Van Kleeck*, 7 *Johns* 477; *Sackett vs. Andross*, 5 *Hill* 334, 7 and 362, 5.)

II. The Act in question under a retrospective construction, is in violation of that provision of the Constitution of the United States which prohibits the State Legislatures from passing laws impairing the obligation of contracts and is therefore void. (*Sturges vs. Crowningshield*, 4 *Wheat.* 122; *Green vs. Biddle*, 8 *do.* 1; *Mason vs. Haille*, 12 *do.* 370, 318, 337; *Bronson vs. Kinsie*, 1 *Howard* 311; *McCracken vs. Hayward*, 2 *do.* 608; 1 *Car. Law Repos.* 385; 2 *do.* 428; 7 *Monr.* 11; *do.* 544; *do.* 588; 4 *Litt.* 84; *do.* 58; 5 *Monr.* 98.)

After advisement, JEWETT, CH. J. and BRONSON, RUGGLES and GRAY, Js., were for affirming the judgment of the Supreme Court, upon the ground stated in the opinion of that Court.

GARDINER, J. (dissenting). The decision of the Supreme Court will be affirmed, (upon an equal division of the members of this Court) as I understand, upon the ground exclusively, that the exemption act of 1842, under a retrospective construction, is in violation of that provision of the Constitution of the United States, which prohibits the States from passing any law impairing the obligation of contracts.

The law in question is as follows: "In addition to the articles now exempt, there shall be exempted from distress and

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levy and sale, necessary household furniture, and working tools, and team owned by any person being a householder, or having a family for which he provides, to the value of not exceeding one hundred and fifty dollars; provided that such exemption shall not extend to any execution issued on any demand for the purchase money of such furniture, or tools, or team, or articles enumerated by law."

The jury have found that the property levied upon was *necessary* for the support of the plaintiff's family, and exempt from execution, if the statute is obligatory upon the defendant.

This is the only question I shall consider. The principle involved is both delicate and important. It has received the deliberate attention of the Supreme Court who have vindicated their judgment in an opinion of unusual ability; and it would seem to be required of those who cannot acquiesce in a decision which will be adopted by this Court, to state the grounds of their dissent.

According to the decisions of the Supreme Court of the United States, the several States may impair the obligation of contracts, First, by laws which annul, modify, or alter the contract itself. (*Story Comm.* § 1379 *Ogden vs. Saunders* 12 *Wheat.* 284; 4 *Wheat.* 197-8.) Secondly, by those which change the effect given by the existing law to the *terms* of the contract, which by some Judges is denominated the *law* of the contract. (*Story Comm.* § 1378 *page* 249; 4 *Wheat.* 341-2; 1st *Howard* 375; 1 *Howard* 319.) An example of this kind will be found in *Kinzie vs. Bronson*, and would be furnished in this State, by a mortgage of real property, which should contain only a description of the premises, the sum secured, time of payment, and names of the parties. It is obvious that in the instance supposed the right and interest of the mortgagor and mortgagee in the premises, would have to be gathered from the existing law, in reference to which this contract was made, and which in these respects, it would tacitly adopt. Bills of exchange, furnish another example. Although the day of payment may be fixed by the instrument,

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the payee is entitled to the days of grace allowed, which thus becomes the law of the contract.

The law of the contract, must not be confounded with the remedy to enforce it. The first, says Judge Washington in *Ogden vs. Saunders*, "remains the same every where and will be the same in every tribunal. But the remedy necessarily varies; and with it the effect of the constitutional pledge, which can only have relation to the laws of each State severally."

Indeed, the distinction between the contract, and the law of the contract is rather formal than substantial. The first, according to the spirit of the authorities, applies where the parties have defined their obligations and duties in express terms. The second, to those cases where the agreement is incomplete, and frequently unintelligible in these respects without the aid of the law, which in the language of Judge Story, "performs the office only of expressing what is tacitly admitted by the parties to be a part of their intention." (*Story Com. Chap. 34, § 1378.*)

In the third place, the obligation of a contract may be impaired by a law "denying a remedy altogether, or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing." This is somewhat indefinite; but it is the language of Chief Justice Taney, and as precise probably as the nature of the subject will permit.

These are the only modes in which, the obligations of a contract can be assailed by State legislation. The law must act upon the contract, or upon the remedy.

There is, however, a broad and well defined distinction, between the authority of the State in the two cases. A State can pass no law the effect of which will be to vary the contract. No benefit to the people, no supposed advantage to the parties will authorize it. The manner and degree in which the change is effected, can in no respect influence the conclusion. (*Story Com. 3 Vol. § 1379.*) The power is want-

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ing, for the prohibition of the constitution is absolute and universal.

It is just as firmly settled by authority, that the states retain their power over the remedy; they may change or modify that at pleasure. "No one," says Judge Story, "will doubt that the Legislature may vary the nature and extent of remedies, so always that some substantial remedy exists." (*Story Com.* § 1379.) In *Kinzie vs. Bronson*, (8 *Howard* 315,) the Court remark, "that undoubtedly a State may regulate at pleasure the mode of proceeding in its Courts, in relation to past contracts as well as future. And although a new remedy may be deemed less convenient, and render the recovery of debts more tardy and difficult, yet it does not follow that the law is unconstitutional. Whatever belongs to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract." And what the legislation must be to procure this result, he has told us in the language I have already quoted.

In *McCracken vs. Hayward*, Judge Baldwin remarks, that it must not be understood by that or any other decision of the Court, that all State legislation upon existing contracts is repugnant to the constitution. And he instances the recording acts, by which an elder is postponed to a younger grantee, the statute of limitations, and he might have added, the laws abolishing imprisonment for debt, a remedy coeval with, and the most stringent known to, the common law. Sufficient has been said upon this distinction between the contract and the remedy, a distinction which, according to Judge Marshall, (*Sturges vs. Crowningshield*, 4 *Wheat.* 200,) exists in the nature of things, and is recognized in every decision in the United States Courts upon this clause in the constitution.

In the light of these principles, I proceed to examine the law of the State of New York.

And in the first place, it is not repugnant to the constitution because it changes or acts upon the *contract* between the parties; or the *law* of the contract. It does not inter-

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fore with the terms of their agreement, whatever they might be, or the effect which the law existing at the time when it was made gave to them.

Indeed, a conclusive answer to any such pretence is, that we know nothing of the terms of this contract. The record states that the judgment was rendered upon a contract. Of its provisions, whether it was made here, or in a foreign country, we have no information whatever.

We know indeed that the judgment record was before the Court; that the Judge was required to charge that the law was unconstitutional, and refused. We might perhaps indulge a presumption in order to *sustain* the decision, we cannot infer *any fact* not stated, in order to *reverse* it.

I assume it therefore as unquestionable, that if the law of this State is obnoxious to the constitutional objection, it is because it impairs the obligation of the contract by striking at the remedy. "That it presents a case within the undoubted "power of State legislation, but that its provisions are so unreasonable as to amount to the denial of a right, and to call "for the interposition of the Court." (*Baldwin J. 2 Howard 613.*) So that we can say with C. J. Taney, (*1 Howard 317*) that "it has burdened the remedy with new conditions and restrictions, so as to render it hardly worth pursuing." Or with Justice Story, "that it leaves to creditors no substantial remedy whatever." In short the enquiry is not as to the existence, but the abuse of legislative power.

If this view of the question is correct, it is believed that the decision of the Supreme Court ought not to be sustained. No reliance is placed by that Court upon the fact that the plaintiff's judgment was recovered prior to the Law of 1842. Nor is the circumstance of any importance; since it has always been held, that the obligation to perform a contract is coeval with the undertaking to perform it. It originates with the contract itself: operates anterior to the time of performance. (*Story Com. § 1379.*) "The remedy, however," says the same author, "acts upon the broken contract, and enforces a pre-existing obligation." (*12 Wheat. 349-50.*)

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The judgment of the Supreme Court is placed upon the broad ground, that "such property as was subject to execution when the debt was contracted, must remain subject to the execution until the debt is paid.

This decision therefore, as to the past contracts in fact annihilates the distinction between the contract and the remedy, and applies to the latter the stringent rules which the United States Courts have confined to the former. By this law, one hundred and fifty dollars of property under certain circumstances, is withdrawn from execution, but if the family bible had been for the first time exempted, the decision would have been the same. No degrees are tolerated. The question is not whether the power of the State has been discreetly exercised. The authority to legislate at all is denied, and in truth the decision must be sustained upon this ground.

It is believed that no Court would assume the responsibility of declaring, that in a community where almost every householder sustains the double relation of debtor and creditor, a statute which should withdraw from the mass of six or seven hundred millions of property, the amount limited by this law, for the purposes therein specified, was either impolitic or unjust towards creditors as a class, their interest being alone regarded. An individual deriving any benefit from this law would generally be indebted to more than one creditor. And if the question was submitted to them collectively, whether one of their number should be paid, by a sale of the implements by means of which the debtor was enabled to support himself and family, or whether they should all rely upon his future earnings for the satisfaction of their debts, they, as reasonable men, would be likely to determine it in the spirit of this law. Regulations of this description, says C. J. Taney, have always been considered in every civilized community as properly belonging to the remedy, to be exercised or not by every sovereignty according to its own views of policy and humanity.

It seems to have been overlooked, that this law in its retrospective operation affects the interest of debtors as well as

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creditors; and is in fact a modified repeal of all the former exemption acts. And according to the decision of the Supreme Court in *Mathewson vs. Weller*, (8 *Denio* 52.) *all* the property of the debtor, is now liable to be sold upon an execution, upon a judgment for the purchase money of any article exempted by *former* laws, as well as the statute in question.

According to this decision, it would be difficult to determine whether in 1842 the amount of property absolutely withdrawn from execution was increased or diminished.

It may be the decisions in *Mathewson vs. Weller*, and in the present case are consistent with each other. But it seems to me, that unless these constructive obligations are implied only in behalf of the *creditor*, and if the principle be sound, that property not exempt at the *making* of the contract, must remain liable until it is satisfied, the converse of the proposition, that property *then exempt* should *remain* so would also be true.

It is obvious that the effect of the two decisions is, to strip the debtor of an old privilege, in place of conferring a new one upon him.

I have abstained from adverting to the higher considerations which may be presumed to have had their influence with the Legislature in procuring the enactment of the statute.

The interest for example, which every well regulated State has in the maintainance of the family; in the education of those who are to succeed to the rights and duties of citizens; and in preserving the means for maintaining the decencies of life, which are so intimately associated with the moral and religious culture of a people. Such motives it is granted cannot confer authority, however important in determining its fair and legitimate exercise. But looking to the effect of this law upon creditors, enlarging their privileges in some respects and restricting them in others, leaving as it does unimpaired all existing remedies in their favor, many of which are in addition to those of the common law, and far more searching and efficacious, and it cannot be said that it leaves to them no substantial remedy. Still less in the language of C. J.

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Taney, are the restrictions of such a character as to make the remedy hardly worth pursuing.

I allude of course to the effect of the law as a whole, not to its operation in especial cases. It is said that in this case it saves all to the debtor, and it might have been added, that it is equally obvious that the debtor acquired *all* that *was saved*, after the return of the first execution upon this judgment, and for ought we know, of a vendor who may have parted with his property upon the security afforded by the act. These creditors may not gain, but they certainly lose nothing by the law. But if it were otherwise, it would make no difference. Every law acting upon the remedy will be productive of some evil. The objection is not so much to *this* law, as to any legislation whatever.

The Supreme Court, as I understand them, do not deny that this act relates to the remedy, but that the remedy is one over which the State has no power in reference to past contracts. We are told "that there is no well defined middle ground, between holding that none, or admitting that *all* a debtor's property may by a subsequent law be exempt from execution."

This argument proves too much, for it applies to all retrospective legislation which may by possibility operate upon the contract through the remedy. The instance of a law regulating the practice of the Courts is not an exception. Such a law, may direct all actions upon contract to be commenced by *capias* to be returned within sixty days after the time of service, or any shorter period, and be *valid*; but if it prescribed ten years it would be held unconstitutional. But in either case, the law would be obnoxious to the objection, that if a State could prescribe sixty days, it might ten years or a longer period, and thus impair the obligation of the contract through the remedy. There is no well defined middle ground in either case. The same may be said of statutes of limitations, recording acts, acts abolishing imprisonment for debt, and those giving time to executors, &c., before suit. The answer to all such objections is to be found in the established

distinction, between the power of the states over the *contract*, and over the *remedy*, between the exercise of a power denied to them by the constitution, and the wrongful exercise of one which they unquestionably possess. The States may legislate upon *all* remedies; they must do it, for they have the exclusive power so far as they relate to their own Courts, but they may not abuse that power, in reference to *any* remedy, so far as to destroy the beneficial effects of the contract. They may therefore exempt the bed of the debtor, but it does not follow that they may a farm worth \$20,000. The first would be a *fair exercise* of authority, the last an *abuse* of it. If between these extremes, there is no well defined middle ground, it is because our National Court has claimed the right to supervise State legislation upon the subject, not merely by entertaining the question, whether *any* remedy was afforded, but whether a substantial one was provided for the creditor. What is their right and duty is ours, and that of every other Court from the lowest to the highest.

We must enter this terra incognita, explore it by the aid of those lights which experience and the knowledge of the state of society among us will afford, and determine for ourselves primarily, whether the particular law transcends the limits of fair legislation, and is in *effect*, whatever may have been the motives of its framers, a *fraud* upon the constitution. We ought not to purchase judicial certainty, by an unqualified surrender of State power.

It is however insisted, that the question is virtually decided by the cases of *Bronson vs. Kinzie*, (1 *How.* 311,) and *McCracken vs. Hayward*, (2 *Id.* 608.) The first was the case of a mortgage executed by Kinzie to Bronson, in which among other things, the former covenants, that if default should be made in the payment of the principal sum and interest secured, it should be lawful for Bronson to enter upon and sell the mortgaged premises at auction, and as attorney for Kinzie convey the same to a purchaser, and out of the monies retain the amount due him, &c. Subsequent to the execution of the mortgage, the State of Illinois passed a law, in substance pro-

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viding, that the mortgaged premises should not be sold except at a sum equal to two thirds of their appraised value, and *when* sold, that the mortgagor should have twelve months within which to redeem; and in his default, his judgment creditors might redeem in three months thereafter. The law was held to be unconstitutional, upon the ground that it deprived the mortgagee of the right to sell the *whole* premises, which was given by the express terms of the mortgage, and second, because it created after sale, a new estate to his prejudice in favor of the mortgagor and judgment creditors. There was therefore a double violation of the contract itself. The case has therefore no application to the present; and as if for the purpose of excluding any such inference, the Chief Justice in his opinion remarks: "That if that law had done nothing more than change the *remedy upon contracts* of that description, it would have been liable to no constitutional objection. For undoubtedly, a State may regulate at pleasure the modes of proceeding in its Courts, in reference to past as well as future contracts." He then instances the statute of limitations, and adds: "that it (a State) may if it thinks proper, direct that the necessary implements of agriculture, the tools of a mechanic, and articles of *necessity* in household furniture, shall, like wearing apparel, not be liable to execution on judgments."

We could almost imagine that the learned judge had our statute before him, while preparing his opinion.

The case of *McCracken vs. Hayward*, arose under the same law which was passed in February, 1841, and under a section, "that when any execution should be levied on real or personal property, or both, the property should be valued according to its cash value, by three householders on oath, one to be chosen by each of the parties, the other by the Sheriff, who must agree in their valuation, which was to be endorsed on the execution; and when such property should be offered for sale, if capable of division, no greater quantity should be offered, or sold, than would be sufficient to pay the amount of the execution, at two-thirds of the valuation thereof, reserv

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ing to the defendant, in all cases, the amount and quantity of property then exempt from execution by the laws of the State."

The property of the defendant was offered for sale by the marshall, but was not sold, as no one bid two-thirds of its value. The plaintiff sued out a new execution, and applied to the Court for an order to sell, regardless of the State law.

The question of the constitutionality of the law did not necessarily arise, as the Circuit Court had not adopted the law of Illinois, which was necessary in order to effect process of execution from that Court. The plaintiff was therefore entitled to the order asked for, and a sale under the former law, which was the law of the Court. But the question *was raised*, and as I infer, decided that the law was unconstitutional. I acquiesce in that decision. It remains to be seen whether it controls the present case.

In the first place, the act was in effect wholly retrospective; it was passed on the 27th of February, 1841, and applied only to judgments rendered, or judgments that might be rendered, on any contract or cause of action arising prior to the first of May in the same year. Its future operation was limited to two months, and the old law afforded the remedy as to all contracts made after that period.

In the second place, as we have seen, it applied to a *particular class of contracts* and creditors. The act upon its face, therefore, furnished the strongest evidence, that it was adopted as a mere stop law, intended to answer a temporary purpose, and was not, in the estimation of the Legislature who enacted it, in the language of the Court, in *Ogden vs. Saunders*, "a full, fair, and candid exercise of State power, to the ends of justice, according to its ordinary administration." The judgment of the plaintiff was obtained in 1840. In August, 1842, when his execution was levied, there was one remedy for him, and a more favorable one for a citizen, who contracted with the same debtor, subsequent to May, 1841, and this in reference to the same property.

Nor was this all. The property must be appraised at two-

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thirds its value, by *all* the appraisers, of which the debtor selected one. Of course his valuation must be adopted or none.

But supposing him not to incline in favor of his neighbor, and the property honestly appraised at two-thirds of what would be deemed its value, if taken upon a cash debt. Who that knows any thing of forced sales of property, can suppose that, as a general rule, it would command two-thirds of the real value. If the debt is considerable, the number who have money, in an agricultural community especially, are very few, and in all cases the sale is made without reference to the wants of the purchaser. The sales of securities under the banking law of this State, have not averaged seventy per cent. of their nominal value, and yet the mortgages are secured on lands valued by sworn appraisers at double the amount secured by the mortgage, in addition to the personal security of the mortgagor. What is true with us, would be so in a State possessing far less capital.

The plaintiff's execution, in the case cited, was returned unsatisfied, because no one would bid to the valuation. It would be very extraordinary if it had been otherwise. A different result, under such a law, would have been an exception to a rule nearly universal. It furnishes, in fact, an effectual shield to the whole of the debtor's property. In a word, whether we consider the extraordinary provisions of the law, or its inevitable practical operation, as tested by all experience, it must be condemned as a gross and flagrant abuse of legislative power.

If the law of 1842 is obnoxious to the same objection, let it receive the same condemnation.

But it is incumbent upon those who hold the affirmative, to establish that the statute of Illinois, which legalized all prior exemption acts, and then withdrew the residue of the debtor's property, including his future acquisitions from executions, which was limited mostly to past contracts, and merely suspended the law existing at its passage, for two months after that period, compelling creditors to pursue distinct and une-

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qual remedies, according to the date of their contracts, is identical in principle with the law of this State, which deprives the debtor of privileges secured by former laws, and then (when fully paid for) exempts household furniture, tools, &c., of those having families to support, to a limited amount, if adjudged to be necessary by a competent tribunal, which subjects the future earnings of the debtor to the claims of creditors, and compels him, by summary process provided by another law, to apply them in discharge of those claims, and which, above all, instead of being partial and temporary in its operation, was adopted as the settled and permanent policy of a great commercial State, in reference to all contracts, and all persons without distinction.

Until this is done, we may avail ourselves of the rule declared by one of the ablest Judges that ever had a seat in the Court of the United States, "that the positive authority of a decision is co-extensive only with the facts upon which it is made." (12 *Wheat.* 333.)

JONES, JOHNSON, and WRIGHT, Js., concurred with GARDNER, J.

Judgment affirmed.

SPEAR and RIPLEY, Appellants, vs. CHARLES WARDELL and others, Respondents.

The assignment which a debtor proceeded against under the non-imprisonment act, executes pursuant to the provisions of that act, (*Stat.* 1831, § 16, 17) is for the benefit of the creditor who institutes the proceeding, and not of the creditors generally.

And a *voluntary* assignment, executed by such debtor, while the proceeding is pending against him, of all his property for the benefit of all his creditors without preference, is a fraud upon the act and the rights of the prosecuting creditor.

Where a judgment creditor instituted a regular and valid proceeding under the non-imprisonment act, and the debtor, while the proceeding was pending, executed a voluntary assignment of all his property for the benefit of his creditors generally without preference, so that no property passed into the hands of the statutory assignee under the statutory assignment subsequently made; *held*, upon a bill filed by the creditor against the debtor and the voluntary assignee, that the voluntary assignment should be allowed to stand, but the assignee should be decreed to hold the property assigned, as a trustee for such creditor to the extent of his demand.

Held also, that the title to the property having passed to the voluntary assignee, the statutory assignee had no interest, which made it necessary to join him as a party to the bill.

Appeal from the Court of Chancery. This case was brought to hearing, before the Chancellor, upon the bill filed by the appellants, and the joint and several answers of the respondents. The material facts were these: The appellants, on the 2d November, 1846, recovered judgment in the Supreme Court against Charles Wardell and Charles E. Wardell, two of the defendants, for \$1,376,97 upon contract. The said Charles Wardell and Charles E. Wardell were partners in trade, and the judgment was for a partnership demand. On the 5th of November they were possessed of notes and accounts to an amount more than sufficient to pay the judgment, and on that day they were requested to apply some of such notes and accounts to that purpose. This they refused to do upon the ground (and so were the facts,) that they were insolvent to a large amount, that a committee of their creditors had recommended that the creditors accept, as a compromise

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of their claims, a per centage upon the amount due them, and in case they did not all agree to do so, then that they intended in good faith to assign all their property to pay their debts without preference.

After this refusal, and on the same day, the complainants procured, from EDMONDS, Circuit Judge, a warrant against the said Charles Wardell and Charles E. Wardell, and had them arrested pursuant to the 4th section of the act to abolish imprisonment for debt and to punish fraudulent debtors. (*Laws of 1831, p. 396.*) After their arrest, but before the decision of the officer, to wit: on the 21st day of November, 1846, they made a voluntary assignment of all their estate, real and personal, to Henry B. Wardell, the other defendant. On the 28th of November, the Circuit Judge decided that the allegations of the complainants were substantiated, and that the said Charles Wardell and Charles E. Wardell had unjustly refused to apply their choses in action to the payment of the judgment. A commitment was accordingly ordered pursuant to the 9th section of the act; to prevent which, they severally made and delivered to the officer an inventory of their respective estates, and an account of their creditors, pursuant to the 8d subdivision of the 10th section of the act. These inventories contained none of the choses in action which had belonged to them as partners, nor any other partnership effects. Such further proceedings were had, that an assignment was directed by the officer pursuant to the 16th section, which they accordingly made to *Stephen P. Nash*, who was appointed assignee by the officer. On the 22d of December, 1846, they were discharged, according to the 17th section. No property passed into the hands of the assignee so appointed, except \$30 in money, the residue of their effects, except such as were by law exempt from execution, having previously passed into the hands of Henry B. Wardell, under the voluntary assignment to him above mentioned. The complainants opposed the discharge of the debtors, on the ground that their proceedings were not just and fair, insisting that

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the said voluntary assignment was a fraud upon the act. But the objection was overruled by the Circuit Judge.

After these proceedings were closed, the complainants applied to Henry B. Wardell, the voluntary assignee, to have their judgment paid, in preference to other creditors, out of the notes and accounts which went into his hands under the assignment to him. He refused to make such payment, or to give any preference over other creditors. The bill insisted, that by the proceedings under the act aforesaid, the complainants had acquired a lien upon, or right to priority of payment out of the choses in action of the said Charles Wardell and Charles E. Wardell, that such lien or right attached as *of the time they were arrested*, that the voluntary assignment made to Henry B. Wardell was a fraud upon the act, and therefore void; or if not so, that he took the choses in action assigned to him subject to such lien or right. The answer controverted these positions. The prayer of the bill was, that the assignment to Henry B. Wardell might be set aside as a fraud upon the act and upon the rights which the complainants had acquired by their proceedings; or, if allowed to stand, that the complainants might be paid the amount of their judgment out of the choses in action so assigned, or the proceeds thereof, in preference to other creditors, and for an injunction, receiver, &c.

The Chancellor made a decree dismissing the bill with costs.

S. P. Nash, for appellants. 1. The creditor who has obtained the commitment of a debtor, under the non-imprisonment act, is entitled to a preference over creditors at large in the distribution of the debtor's property under the act. (*People vs. Abel*, 3 Hill 109; *Berthelon vs. Betts*, 4 Hill 577; *Moak vs. De Forest*, 5 Hill 605; *practical directions under the non-imp. act*, (pamph.) p. 15.) 2. It follows that any voluntary disposition by the debtor, pending the proceedings, in order to defeat such preference, is a fraud upon the statute, and a Court of Equity has jurisdiction to protect the creditor's rights, and set aside the fraudulent act. 3. This jurisdiction

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can only be exercised on behalf of the creditor whose priority has been overreached. He is therefore the proper party complainant. 4. The decree of the Chancellor should be reversed, and the defendant, Henry B. Wardell, be directed to pay the complainant's judgment with interest and costs.

J. S. Bosworth, for respondents.

WRIGHT, J. The important question in this case is, whether a voluntary assignment of property for the benefit of creditors generally, made by a defendant after his arrest and during the pendency of proceedings under the act "to abolish imprisonment for debt and to punish fraudulent debtors" is a fraud upon such act, and upon the rights of the prosecuting creditor thereunder. An examination of the objects and aims of the statute of 1831, and its peculiar, and, generally admitted, quite imperfect provisions, is involved in the inquiry.

Its professed objects are, to abolish imprisonment for debt and to punish fraudulent debtors. But it goes further; aiming to provide to the prosecuting creditor of such fraudulent debtor a remedy for enforcing the payment of his demand. Whilst as a civil remedy (and only as such I shall consider it) it takes from a certain class of creditors the power of coercing from all debtors satisfaction of their demands by imprisonment, it gives, with a single exception, to the creditors of such class, who may prosecute, and who shall pursue its provisions, as against a fraudulent debtor, a new remedy, which, in its operation, continues the power of coercion by imprisonment in a severer form, unless the debt shall be paid, or all the debtor's property, legal and equitable, be set apart, in the form prescribed, for its payment. In the exception alluded to, where the particular fraudulent design established against the debtor is, that he is about to remove any of his property out of the jurisdiction of the Court in which the suit of the prosecuting creditor is brought, it continues such coercion by imprisonment, unless the debtor shall, in effect, indemnify the creditor against the commission (until the demand of the pro-

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secuting creditor, with costs, shall be satisfied, or until the expiration of three months after a final judgment shall be rendered in the suit brought for the recovery of such demand) of certain fraudulent acts, tending to impair or destroy the creditor's remedy against the property held by the debtor at the date of such indemnity. The new remedy is not given to *all* who may have demands against the debtor arising upon contract, but only to those who shall have commenced a suit against the debtor, or shall have obtained a judgment or decree against him in a Court of Record; and considering that a leading purpose of the act was to abolish imprisonment on demands *ex contractu*, there was a fitness and propriety in confining the new remedy to the two classes enumerated, for they were the only persons who could arrest and imprison on the demand itself, or could be *immediately* affected by the abolition of the old remedy. As against the honest debtor the act absolutely abolishes imprisonment; but against the dishonest one, it provides that imprisonment, as a remedy or means of coercion shall still exist; to be avoided by the payment of the debt or demand by the debtor, or by his giving satisfactory security for its payment, or by justly and fairly setting apart his property, legal and equitable, for that purpose; and in one class of frauds, by indemnifying the prosecuting creditor against the commission of certain fraudulent acts, whilst such creditor is prosecuting his demands against him to judgment, and until three months afterwards. Imprisonment is to follow the fraudulent debtor's conviction, unless in the mode prescribed, the demand of the prosecuting creditor shall be paid, or payment secured, or the debtor's property delivered up to satisfy such demand; or the debtor indemnify the prosecuting creditor against a fraudulent disposition, within a specified period, of the property he may then have. And if such debtor be committed to prison, he shall remain in custody in the same manner as prisoners on criminal process, "until a final judgment shall have been rendered in his favor in the suit prosecuted by the creditor; at whose instance such debtor shall have been committed, or until he shall have assigned his pro-

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perty and obtained his discharge," but he may be discharged at once, without assignment of his property, by payment of the debt or demand, or giving security for the payment thereof. As against a fraudulent debtor, the provisions of the act, are, in the language of Justice Cowen in the case of *Berthelon vs. Betts* (4 Hill 577), "in effect, a statute execution against choses in action and other effects not tangible by the ordinary *fi. fa.* The statute gives the creditor or creditors certain process by which he or they may coerce the payment of a debt or debts for which the debtor has been prosecuted."

After a careful examination of its provisions, this is the construction that I place upon the objects and intent of the act as a civil remedy. For if the object be not to coerce from the fraudulent debtor the payment of the debt or demand of the creditor or creditors who are permitted to institute proceedings, but, as is contended, only an assignment of the debtor's property for the benefit of creditors at large, then is it worthless as a remedial statute, and the aim of the legislature in providing a punishment for fraud, or a severer remedy to coerce the payment of demands *ex contractu* against a fraudulent debtor, is entirely frustrated; for what creditor with the object only in view of coercing an assignment of an insolvent or fraudulent debtor's estate, which should enure to the benefit of all creditors, would institute proceedings under the act? In construing remedial statutes, Courts should endeavor, in consistency with established rules of construction, to impart to them the force and efficacy contemplated by the Legislature.

I propose briefly to examine in detail those sections of the act having a bearing on the question involved in this case. Such examination, unless I am clearly mistaken, will serve to fortify the views I have taken of the act as a civil remedy. The third section points out only two classes of persons that may institute proceedings; and they, as has been remarked, are the only ones *immediately* affected by the operation of the first section. Unless a creditor falls within one or the other of these classes, he cannot institute a prosecution. There is

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no provision for the coming in of other creditors under the proceedings instituted by either class, nor a joinder of several creditors of the specified classes. At the outset the proceeding is an individual one, contemplating an individual benefit, and looking ultimately to the furtherance of two ends, viz: punishment of fraud, and individual interest. The warrant issues to arrest *the defendant in the suit* which the prosecuting creditor has commenced against him in a Court of Record, or in which he has obtained a judgment or decree; this peculiar statutory arrest being given, in such suit, against a fraudulent debtor, in lieu of the remedy taken away of arrest in the one case on *mesne*, and in the other on *final* process.

The causes specified in the fourth section for granting the warrant to arrest the debtors, are such as may apply to individual creditors, but some of them such as would not ordinarily apply to all creditors. Indeed, those specified in the first and fourth subdivisions of the section, have no application to any other creditor than the one prosecuting, nor any relation to any other suit than the one in which such creditor is prosecuting the debt or demand due to him from the defendant, or in which he has obtained a judgment or decree. Consequently, if the construction of the act be correct that the prosecuting creditor obtains no preference, but that the assignment which follows is for the benefit of the creditors at large, the anomaly is presented of a result flowing from a cause with which it has no possible connection, and without which, the officer granting the warrant would have no jurisdiction to entertain the proceeding, or order the assignment. So, also, it seems to me very apparent that the causes specified in the second subdivision of the section have no application to creditors generally. The causes are, "that the defendant has property or rights in action which he fraudulently conceals, (that is, the defendant in the judgment or decree of the prosecuting creditor) or that he has rights in action, or some interest in any public or corporate stock, money or evidences of debt, which he unjustly refuses to apply to the payment of any judgment or decree which shall have been rendered against him, belonging to the complainant." The subdivision

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applies exclusively to a case wherein the prosecuting creditor has obtained a judgment or decree against his debtor, and he has "property or rights in action which he fraudulently conceals," or on application by such creditor, such debtor unjustly refuses to apply his equitable assets to the payment of such judgment or decree. There must, therefore, be an unjust refusal, on the part of the debtor to apply his property that an ordinary *fi. fa.* cannot reach, to the payment of the judgment or decree of the prosecuting creditor; without which, for want of jurisdiction in the officer the proceeding would be void. It contemplates a charge that none but the prosecuting creditor, either at the initiation of the proceeding, or at any other time, can make, and has reference to the payment of *his* debt, and no other. If, by substantiating the charge, and arresting the debtor and thus compelling an assignment of his property, the prosecuting creditor acquires no right of priority under such assignment, or no right attaches in his favor on the debtor's property, but the same is to be distributed *pro rata* amongst his creditors, it seems to be a very absurd mode of accomplishing the result.

The remaining sections aim especially at securing the rights of the prosecuting creditor. By the seventh section the debtor may controvert any of the facts and circumstances on which the prosecuting creditor's warrant issued. The latter alone may examine the defendant touching facts material to the inquiry; the debtor and such creditor are the only parties that may offer proofs; and if the debtor obtains an adjournment of the proceedings, the bond shall be given to such creditor, and its penalty shall be in double the amount of the debt that *he* claims. The proceedings prescribed in the tenth section for averting a commitment, respect only the prosecuting creditor, and his debt or demand. If such debt or demand, with costs, be paid by the debtor, or security be given for such payment within sixty days, no commitment is to be granted, and the proceedings are at an end. No other creditor can continue them for his own benefit, or with the view of coercing an assignment. The debt or demand claimed in the pend-

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ing suit, or by the judgment of the prosecuting creditor, being paid, the operation of the new remedy, in lieu of the old one of imprisonment, consequently ceases. So, also, the bonds prescribed by such section are to be given to the prosecuting creditor, and in penalties twice the amount of his debt, showing that the entire section has relation to the satisfaction or security of his interests alone. By the eleventh section, the debtor being committed to prison, can only be discharged by the performance of acts, or the happening of a contingency, having relation exclusively to his connection with, or a right gained by the prosecuting creditor. Such debtor is to be discharged in case final judgment shall be rendered in his favor in the suit of the prosecuting creditor, as he would have been if imprisoned under the abolished remedy on *mesne* process. So also if he pays the debt or demand of the prosecuting creditor, or gives security for its payment, or executes to him either of the bonds mentioned in the tenth section, or justly and fairly assigns all his property by which payment of the prosecuting creditor's debt may be secured or enforced.

By the fourteenth section the prosecuting creditor is the *only* person who is to have notice of the time and place of the debtor's presenting a petition for an assignment of his property, and for a discharge, and on whom copies of such petition, and the account and inventory thereto annexed, are to be served. By the twenty-fourth section, whenever a bond to avert a commitment, given under the tenth section, shall become forfeited by the non-performance of the condition thereof, it may be sued by the prosecuting creditor only, and he may recover on it the amount of his claim; and there is no provision for the recovery on such bond of the claims of other creditors. By the act, as amended in 1845, the debtor, instead of assigning his property, may be discharged from imprisonment upon his putting in and perfecting special bail in any suit which shall have been commenced against him by the prosecuting creditor, whether a judgment or decree shall have been obtained thereon or not; and having thus put in and perfected bail, and obtained his discharge, he may be impri-

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soned upon any execution issued against his body, in such suit in the same manner, as though the act of 1831 had not been passed.

Thus is kept constantly in view a right attaching to or acquired by the creditor who initiates the proceeding and pursues the debtor. The provisions of the act, step by step, aim at the satisfaction of his debt or demand. He alone is to have notice of the various steps the debtor may take to avert commitment, or in obtaining his discharge; and he alone is to be charged with the costs and expenses which the debtor shall have incurred in the event of a dismissal of the complaint.

But it is insisted, that, notwithstanding the debtor be arrested in the suit of the prosecuting creditor only, that up to the conviction, no person but such creditor can take any part in the proceedings, and that all the means pointed out by the act for the debtor to avert commitment, enure exclusively to the benefit of such creditor; yet, that when the debtor shall be discharged by petition and assignment, such assignment shall be for the benefit of all his creditors rateably. This construction is certainly in opposition to the general tenor of the act. Without the clearest light, therefore, to be drawn from its provisions relating to the petition and assignment, I should hesitate long to adopt a construction that would totally destroy its efficacy as a remedial statute, and leave men to make fraudulent dispositions of their property, and to contract debts without the least means of coercing their payment. I see nothing, however, in those sections, relating to the petition, assignment and discharge, which imperatively calls for such a construction. The twelfth section provides that the debtor who may be committed to prison at the suit of the prosecuting creditor, or who shall have given a bond to avert commitment on the complaint of such creditor, conditioned that he will, within thirty days from conviction, apply for an assignment of all his property and for a discharge, or against whom any suit shall have been commenced in a Court of Record, in which such debtor, by the provisions of the act,

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cannot be arrested or imprisoned, may petition that his property may be assigned, and that he may have the benefit of the provisions of the act. The only benefit that the act confers, and for which he may pray, is to be exonerated from being proceeded against under those sections which relate to his arrest and conviction for any fraud committed or intended before his discharge, by any creditor entitled to a dividend of his estate. The only creditors in a situation to proceed against him under the act, at the time of the debtor's application, are those enumerated in this section, and they are consequently the only persons whose rights are to be immediately affected. Their relation to the debtor assimilates to that formerly sustained by creditors who had charged in execution the person of their debtor. The petition is not that he may have a discharge that shall exonerate him from being proceeded against by all creditors; for if this were so, the debtor would receive a discharge as against all not in a situation to pursue the proceedings under the act, without notice to them. By the thirteenth section, the debtor, on presenting his petition, is to deliver an account of his creditors, and an inventory of his estate, similar, in all respects, to the account and inventory required of a debtor by the sixth article, of title first, of chapter five, of the second part of the Revised Statutes; and shall annex to such petition, account and inventory, an affidavit similar, in all respects, to the oath required by the fifth section of such article. Now, this sixth article provides for a proceeding on the part of the debtor which shall enure to the benefit of the prosecuting creditor or creditors alone, and the inventory is unlike that to be made when such debtor assigns, under the third and fifth articles of the same chapter, for the benefit of all his creditors. But the Chancellor thinks "that the person who drew the act, probably by inadvertence substituted the sixth for the fifth article, as the thirteenth section of the act of 1831 provides that the debtor shall deliver an account of his creditors, and an inventory of his estate similar, in all respects, to the account and inventory required by the sixth article, and by the sixth article no ac-

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count of creditors is required to be annexed to his petition." I should certainly be unwilling to rest a construction of this section, and as a consequence possibly the act itself, on a supposed "inadvertence" of the framer of the law, or of the Legislature that passed it. By the sixth article, the debtor must set forth in his petition "the cause of his imprisonment," which, of course, would embrace the name or names of, and the sum or sums due to, the creditor or creditors at whose suit he is imprisoned, and who only are interested, and this would be informally "an account of his creditors." I understand the requirement of the thirteenth section of the act to be, that the debtor shall deliver an account, not of *all* his creditors, but of those mentioned in the twelfth section who have pursued or may pursue him to a conviction under the ninth section. If the reference to the sixth article be incorrect, then either no affidavit would be required, or one varying essentially from that prescribed in such article. By the third and fifth articles of the chapter of the Revised Statutes referred to, the debtor is to make oath, substantially, that he has not preferred any of his creditors with a view to obtain the prayer of his petition, or "with the view that they should abstain or desist from opposing his discharge;" but such is not the nature of the oath required by the sixth article, where the question of preference as to creditors generally does not arise, and where the debtor's discharge, as in the third and fifth articles, cannot be denied for giving such preference. Instead of the thirteenth section incorrectly referring to the sixth article, I think such reference is in harmony with the objects and aim of the act as developed in the preceding sections; and instead of having, as the Chancellor concludes, "no particular bearing upon the question as to who is to take the beneficial interest in the assigned property under the assignment provided for in the sixteenth section," it furnishes a strong foundation for the opinion that the Legislature did not intend that such assignment should enure to the benefit of all the assignor's creditors rateably. For had such been the intention, the inventory and oath would doubtless have

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been assimilated to those, in cases under our insolvent laws, which contemplate such a result, and which look, in such inventory and oath, and in all other proceedings, to securing equality of distribution amongst creditors. The discharge, by the seventeenth section, only operating against a particular class of creditors, there was a propriety in assimilating the proceedings to a branch of the existing insolvent laws, whose operation was of a similar character.

The fifteenth and sixteenth sections of the act, regulate the proceedings on the debtors petition; and direct that if at the hearing the opposing creditor shall fail to satisfy the officer that such proceedings are not just and fair, or that he has concealed, removed or disposed of any of his property with intent to defraud his creditors, such officer shall order an assignment of all the property of the debtor in the same manner as provided in the fifth article, of the first title, of the fifth chapter of the Revised Statutes, except such as is therein exempt; which assignment shall be executed with the like effect as declared in such article, and shall be recorded in the same manner. By an examination of the fifth article it will be found that the only effect declared therein is "to vest (by the assignment) in the assignees all the interest of such insolvent at the time of executing the same, in any estate or property, real or personal, whether such interest be legal or equitable." It nowhere declares who are to be the distributees under the assignment. It would seem that the reference to the article is simply for the purpose of ascertaining what property the assignment passes, and the period from which it relates. I cannot avoid the conviction, that if the intention had been to determine who were to be the distributees, the Legislature would have referred to those sections of the insolvent laws specifically regulating that subject; and I am not disposed, with the view of establishing a particular theory of distribution, to argumentatively incorporate into the article referred to, a provision of another article, which, in accordance with my view of the general object and intent of the act of 1831, the Legislature designedly omitted.

The eighteenth section provides that the assignees to whom the assignment shall be made, shall be vested with all the rights and powers over the property so assigned which are specified in the eighth article, of the first title, of chapter five, of the second part of the Revised Statutes, and shall be subject to the same duties, obligations and control in all respects, and shall make dividends. The only section in the eighth article which directs as to distribution, provides a different mode in proceedings under each of the articles of the title. Under the third and fifth articles, the distribution is to be among all who were creditors at the time of the execution of the assignment; under the sixth article, among those at whose suit the debtor was imprisoned on execution at the time of his discharge. So that the eighth article throws no light on the question of distribution.

It is apparent that if the Chancellor's construction of the 16th, 17th and 18th sections of the act of 1831, be the only "sensible" one, viz: that the assignee takes the property of the debtor as a trustee for the benefit of all the creditors of the assignor rateably, then the discharge should exempt the debtor from arrest or imprisonment generally; but such certainly is not the intent of the act. The seventeenth section specifically declares the effect of the discharge. It is, that for any fraud committed or intended before such discharge, the debtor shall be exonerated from being proceeded against under those sections which authorize his arrest and conviction by any creditor entitled to a dividend of his estate; not that he shall be exonerated from arrest and imprisonment by *all* creditors, but clearly, by reasonable construction of language, by those creditors only, who, before such discharge, were entitled to proceed against them under the act. No creditor unless he had commenced a suit or obtained a judgment or decree could proceed; and it is against the proceedings of such creditors alone that the discharge operates. Its operation cannot be against all creditors. The Legislature could not have intended to conclude creditors by proceedings of their debtor, of which proceedings they were not to have notice. If this were so, a

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debtor in collusion with a friendly prosecuting creditor might fraudulent pursue the provisions of the act to an assignment and discharge, and other creditors, without notice, be bound by his proceedings. If, therefore, the discharge, which is the fruit of the assignment, is only to operate against those creditors who may pursue the provisions of the act, that would seem to follow, which is but equity, that the distribution of the debtor's property should be among those affected by it. This is a principle always heretofore acted upon in the distribution of the estates of insolvents, and on no other principle can equity be done. In a case under this act, if the principle of equality of distribution amongst all creditors should govern, the effect would be that a certain class of creditors whose remedy, by coercion was gone, would but receive rateably with others to whom it was continued; and whilst the right of the particular creditors specified in the second section of the act to imprison the debtor remained, they would also, under a remedy not given to them, become distributees rateably of his property. This, in respect to the means provided for enforcing payment from a fraudulent debtor, would not be that "equality among creditors" which, under other circumstances, is declared to be equity.

An attentive consideration of its provisions has led me to the conclusion, that the intent of the act of 1831, was, after abolishing imprisonment for debt in suits arising upon contract to provide a remedy for those immediately effected by such abolition, through which they might reach the fraudulent debtor's property, to satisfy their demands; that the proceedings taken under such act enure to the benefit of the prosecuting creditors exclusively; that by initiating and pursuing the remedy prescribed by it, they acquire a right of priority or preference in the distribution of the debtor's estate; and that neither expressly or by implication is there any authority for such distribution amongst creditors generally, but the whole scope and tenor of the act is in opposition to it. I am, therefore, of the opinion that a voluntary assignment by the debtor of all his property for the benefit of his creditors gen-

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erally, pending the proceedings against him, and in order to defeat the prosecuting creditor's preference of payment out of such property, is a fraud upon the act of 1831, and upon the rights of such prosecuting creditor.

In the present case, after the arrest on the complaint of the appellants, and pending the proceedings against them, the respondents, Charles Wardell and Charles E. Wardell, executed an assignment to Henry B. Wardell, of all their co-partnership property and effects to pay all their creditors rateably, and Charles Wardell, also, at the same time, assigned to Henry B. Wardell all his individual property, in trust, to pay his individual creditors rateably, and then to apply the surplus to the payment *pro rata* of the creditors of the firm. The whole of the property at the date of the assignment was delivered to the assignee, who now holds and refuses to make any disposition of it, or the proceeds thereof, otherwise than upon the terms expressed in assignment to him. The respondents, in their answer admit that the assigned property is much more than sufficient to pay the demand of the appellants. These assignments were made in fraud of the act, and of the rights of the appellants acquired thereunder; and it is plainly to be perceived, were so intended by the respondents themselves. For if, as they now contend, the statutory assignee would take for the benefit of all creditors, why, pending the proceedings, voluntarily make assignments having the like effect? Nothing can be more undoubted than that the respondents contemplated a fraudulent interference with the statutory assignment.

On the main question, therefore, I am of the opinion that that the decree of the Chancellor is erroneous, and should be reversed. With regard to the mode in which relief shall be granted to the appellants under the circumstances of this case, my views fully accord with those expressed by my brother Bronson.

BRONSON, J. The first question is, whether the assignment which a debtor executes under the non-imprisonment

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law, (*Stat.* 1831, p. 400, § 16-17) is for the benefit of all his creditors; or whether the assigned property goes exclusively to the creditor who instituted the proceedings. The Chancellor had considered this as an open question; but as I understand the authorities, it had been settled, so far as the Supreme Court could settle it, that the property goes to the particular creditor who compelled the assignment, to the exclusion of all others, until his debt is paid. The proceeding is nothing more than a statute execution which reaches property not subject to seizure by *feri facias*, and such as, through the fraud of the debtor, either has been, or is in danger of being placed beyond the reach of ordinary process. The question was considered in *The People vs. Abel*, (8 *Hill* 109,) and though not then decided, I well recollect that there was no diversity of opinion among the Judges on the subject. And in *Bartholomew vs. Betts*, (4 *Hill* 577,) the point was necessarily decided; for if the act of 1831 is an insolvent law, its operation was suspended by the bankrupt act at the time the creditor in that case instituted proceedings to compel an assignment; and it clearly is an insolvent law, if an assignment under it is made for the benefit of all the creditors. It was therefore necessary to decide the question; and the Court held, that the act of 1831 was not an insolvent law, but only a new remedy in favor of a creditor who had commenced a suit, or recovered a judgment against the debtor. *Moak vs. De Forrest*, (5 *Hill* 605,) holds the same doctrine. And so far as I have been able to learn, the non-imprisonment law has uniformly received this construction among those who have administered it, from the time of its enactment in 1831, down to the time this case was decided in August last. I do not think it necessary to add any thing on this branch of the case further than to say, that the high respect which I always feel for the opinions of the Chancellor has induced a careful re-consideration of the question, which has resulted in confirming my former opinion.

The defendants, in the judgment were arrested on the warrant and taken before the Circuit Judge on the fifth of No-

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vember; and after several adjournments, the Judge, on the 28th day of that month, decided that the allegations of the complainants were substantiated; that the defendant had rights in action and evidences of debt which they had unjustly refused to apply to the payment of the judgment, and that a commitment must issue in pursuance of the 9th section of the act. Pending the proceedings, and on the 21st day of the month, the defendants in the judgment made a voluntary assignment of all their property to the defendant Henry B. Wardell, the son of the defendant Charles Wardell, in trust, to apply the avails of the property, after satisfying the expenses of executing the trust, for the benefit of all the creditors, without any preference. The value of the property thus assigned greatly exceeded the debt of the complainants; but was not enough to pay all the creditors: and in consequence of this assignment the defendants in the judgment had no estate to insert in their inventory when they afterwards applied to the Judge for a discharge under the act, for the purpose of preventing the commitment which had previously been ordered. Now although the complainants acquired no lien upon the property by commencing proceedings under the act, they acquired the right to a preference over the other creditors, which could not be defeated by a voluntary assignment; and the transfer of the property to Henry B. Wardell was a fraud upon the law, and the complainants, which a Court of equity should not permit to succeed. (*Wood vs. Bolard*, 8 *Paige* 556, *matter of Hurst*, 7 *Wend.* 239; *Hadden vs. Spader*, 20 *John.* 554; *McDermutt vs. Strong*, 4 *John Ch.* 687.) The Chancellor would, I presume, have felt no difficulty in granting relief, if he had not come to the conclusion that the assignment under the statute was for the benefit of all the creditors.

If the complainants had obtained a lien on the property by commencing proceedings under the statute and the title had vested in Nash the statute assignee, he would then have been a necessary party to the bill. But as their was no lien, the legal title to the property passed to the defendant Henry B.

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Wardell under the voluntary assignment ; and so long as that assignment stands, Nash has no interest which can make it necessary for him to join with the complainants in a bill for the assertion of their rights. If we should set aside the voluntary assignment, and thus subject the property to the operation of the statute assignment, then Nash might be a necessary party. But there is no occasion for setting aside the voluntary assignment. It covers a large amount of property beyond what is necessary to pay the debt of the complainants, and they are the only creditors who are entitled to a preference. The proper course, having regard to the rights and interests of all the creditors, will be, to declare that Henry B. Wardell holds the assigned property as a trustee for the complainants to the extent of their debt, and make a decree that he pay the same. In this view of the case Nash has no interest, and the objection that he should have been made a party must be overruled.

I am of opinion that the decree of the Court of Chancery should be reversed ; and that a decree should be entered in favor of the complainants, as above suggested. They should also have costs in the Court of Chancery.

Decree accordingly.

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BURKLE and GEBBARD, Executors, &c., vs. LUCE.

After a Sheriff had levied upon property which belonged to the defendant in the execution, another person brought replevin, and had the same property delivered to him upon the writ, and died pending the action; *held*, that the Sheriff might retake the property and sell it to satisfy the execution.

On the death of a plaintiff in replevin the action abates and cannot be revived by *scire facias*.

In such a case the defendant has no remedy upon the replevin bond.

Where the original Execution upon which a levy had been made was lost, and the Supreme Court from which it issued, ordered, on motion, that a new one like the original be issued as a substitute therefor, that the Sheriff's certificate of the levy be endorsed thereon, and that such substituted execution and certificate have the same force and effect as the original would have; and a new execution was issued and endorsed accordingly; *held*, that the same was admissible as primary evidence to prove and justify the levy without showing the loss of the original.

On error from the Supreme Court. Burkle and Gebbard, as executors of the will of Charlotte Seitz, sued Luce in replevin. The cause was first tried at the Oswego Circuit in June, 1843, when a verdict was had for the plaintiffs. The Supreme Court on bill of exceptions granted a new trial. (See 6 Hill 558.) The cause was again tried before GRIDLEY, Circuit Judge, at the Oswego Circuit, in June, 1845. The case was this: The defendant was a deputy of the Sheriff of Oswego county, and on the 8th of January, 1840, a *fiery facias* was delivered to him against Christian J. Burkle, and on the same day he levied it upon the property in controversy. Charlotte Seitz claiming the property under a previous sale to her from Burkle, brought replevin against the defendant and had the goods delivered to her by virtue of the writ. That action was tried and a verdict found for the defendant, which was set aside, and a new trial ordered. Afterwards on the 11th of February, 1842, Mrs. Seitz, the plaintiff in that action died, having made her will, and appointed the plaintiffs in this suit her executors. In July or August following, the defendant repossessed himself of the goods, and claimed to hold them by virtue of his levy above

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mentioned; and thereupon the plaintiffs as executors brought this second action of replevin and retook the property.

Burkle, the defendant in the execution, was the owner of the property on the 26th of December, 1839, and on that day executed a bill of sale of it to Mrs. Seitz, which sale was claimed by the defendant to be fraudulent and void as against the creditors of Burkle, and evidence was given tending to show that such was the fact. The question of fraud was submitted by the Circuit Judge to the Jury.

The plaintiffs' counsel requested the Judge to charge, that although the sale by Burkle to Mrs. Seitz might be fraudulent, yet that the execution of the writ of replevin brought by Mrs. Seitz, destroyed the lien of the *feri facias*, and that the defendant had no right to retake the property. The Circuit Judge refused so to charge, and the plaintiff excepted.

Evidence was given tending to show that the original *feri facias* was lost after the levy was made under it. It also appeared that after the supposed loss, the plaintiff in the *feri facias* made a motion in the Supreme Court for relief, and on that motion, after hearing counsel on both sides, the Supreme Court made an order, that a new execution be issued under the seal of the Court, similar to the original one, that the directions to the Sheriff and the Sheriff's certificate of levy, which were endorsed on the original, be endorsed on the new one to be issued, and that such new execution and the endorsements thereon be of the same validity and effect for all purposes as would have been the original, had not the same been lost. In pursuance of this order a new execution was issued, which was a copy of the original, and on which the defendant as deputy sheriff made the same endorsement of levy as he had made on the original. This substituted execution was offered in evidence on the trial. This was objected to by the plaintiffs, on the ground that the loss of the original was not sufficiently proved. The Judge admitted the execution in evidence, and the plaintiff excepted.

The jury found a verdict for the defendant; and the plaintiffs moved in the Supreme Court for a new trial upon bill of

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exceptions, which motion was denied, and judgment rendered for the defendant.

W. Duer, for plaintiff in error.

N. Hill jr. and *E. B. Talcott* for defendant in error.

JEWETT, CH. J., delivered the opinion of the Court. I am of opinion that the action brought by Mrs. Seitz, abated by her death, and could not be revived by *scire facias*. (2 R. S. 576, § 2; *ib.* 386-7, §§ 2, 3; *Webber vs. Underhill*, 19 Wend. 447; *Cutfield vs. Corney*, 2 Wils. R. 83.)

The plaintiffs, however, insist that the delivery of the goods to Mrs. Seitz, by virtue of her writ of replevin, put an end to the lien acquired by the levy under the execution made by the defendant, and consequently he had no right to retake the property, although the suit was at an end. If this position be correct, it would seem plain that the plaintiff in the execution, might lose all remedy under it to collect his debt, although there was enough property of the defendant in the execution levied upon, to satisfy it, and still have no remedy upon the bond given by the plaintiff, in the replevin suit, to the Sheriff on his executing the writ; the condition of the bond being, that the plaintiff will prosecute the suit to effect, and without delay, and that if the defendant recover judgment against the plaintiff in the action, he will return the same property, if return thereof be adjudged, and will pay to the defendant all such sums of money as may be recovered against him, by such defendant in the said action, for any cause whatever. To comply with the conditions of the bond, the plaintiff was required, 1st, to prosecute her suit to effect without delay, and 2d, in case the defendant recovered judgment against her in the suit, to return the same property, &c. Having died during the due prosecution and pendency of the suit, the law holds that the prosecution was to effect, "because there was neither a non-suit or verdict against her." (2 R. S. 523, § 7; *Badlam vs. Tucker*, 1 Pick. 284; *Duke of Ormand vs.*

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Bissly, Carthew 519,) and therefore no breach of the condition of the bond occurred, and the defendant has no remedy upon it, although the suit was at an end and the plaintiffs representatives were in quiet possession and use of the property replevied. The condition of the bond does not cover the case. (*Cowdin vs. Stanton*, 12 *Wend.* 120.)

The plaintiff's counsel has cited, in support of his proposition, (*Bradyll vs. Ball*, 1 *Brown Ch. R.* 427; *Woglam vs. Cowperthwaite*, 2 *Dall.* 68; *Frey vs. Leeper*, 2 *Dall.* 131; and *Acker vs. White*, 25 *Wend.* 614.)

In the first case, the goods of one Bradbury, a tenant, were distrained by his landlord for rent; the tenant brought replevin, and pending the suit became bankrupt, as also his sureties in the replevin bond, and his goods, including those distrained, passed into the hands of the defendants, Jones and Ball, his assignees who sold them. Afterwards the defendant obtained judgment in the cause in replevin, and sued out a writ, *de retorno habendo*, and filed his bill in Chancery, insisting that he had an equitable lien upon the goods taken in distress for a return of the goods, or payment of the value of them by the assignees. It was urged by the defendants that the landlord had no title to the goods, but only a right to call on the Sheriff to take them into his possession. That the writ carried the idea of the right of the tenant to sell the goods, that the landlord had no interest or property in them and could not prevent the replevin; that the sale by the Commissioners took away all the right of the landlord; that the assignees sold the goods before the landlord was entitled to the *retorno, habendo*; and if Bradbury himself had sold the goods after the replevin, the result must have been the same, his other goods would have been liable, and if he had none, the pledges would be. That the replevin bond was not forfeited before the bankruptcy, so that Bradbury was not discharged; he and his sureties might be sued, for, till the return awarded, there was no forfeiture of the bond.

Lord Loughborough, Lord Commissioner, said that when the goods were replevied, they are delivered over to abide the

event of the suit. If they came afterwards into the hands of persons in privity with the tenant, they would be liable upon the return, &c. If sold, an action for money had and received, would lie for the money, and concluded by saying: "If the assignees were liable in equity, the value being settled, they must be so at law, and therefore ordered that the bill be retained, and that an action at law be brought for money had and received to the plaintiff's use, against the assignees." Such action was brought, and the Court held that the plaintiff had no lien upon the goods, and afterwards the bill was dismissed, and the defendant left to his remedy on the replevin bond, which, in that case, was complete; and during the pendency of the replevin suit, the property had passed into the hands of the assignees in bankruptcy, who had sold the same, and thereby third persons had acquired rights under the plaintiff in replevin.

The case of Woglam vs. Cowperthwaite, was this: Emlen distrained the goods of Hamilton, his tenant, for rent. The tenant brought replevin and gave security to the Sheriff, and afterwards moved the goods into the house of Woglam, who, after rent had accrued to him, distrained the same goods. The next day after this distress was made, Hamilton removed the goods from off the premises. The officer who made the last distress followed them and had them appraised in the house to which Hamilton had removed them. Shortly after this, and while the goods remained where they were appraised, the defendant, in the first replevin suit, obtained judgment for his rent, and issued a *retorno habendo*, by virtue of which the Sheriff took the goods and delivered them to Emlen's officer who sold them. The action was against the Sheriff for taking the goods under the *retorno habendo*, and the question submitted to the Court was, whether the goods were liable to be taken under that writ so as to exclude Woglam's distress? or whether, by the removal of the goods by Hamilton, the lien on the property acquired by Woglam's distress was not defeated as against Emlen? The Court, on the authority of the case of Bradyll vs. Ball, held that no lien remained

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in Emlen; that by the replevin the securities in the bond were substituted in the place of the goods, which were restored to the tenant, as his sole property; that he might sell them, that they might be taken in execution, and that they became liable to any future lien or incumbrance. Upon the *retorno habendo*, if the identical goods distrained were found in the hands of the tenant undisposed of and unincumbered, they might be taken by the Sheriff; if not, after an *elongata* returned, a *withernam* might go against the general goods of the tenant.

The same principle was repeated in *Frey vs. Leeper*; that the lien on the goods was discharged by the security given to the Sheriff, and as soon as they were delivered back to the plaintiff in replevin, they were open to execution or a new distress. That was also a cause where the goods had been taken as a distress for rent.

In *Acker vs. White* it was said on the authority of the first two cases, that the bond given to the Sheriff is a substitute for the goods, and that a replevin of the goods put an end to the lien of an execution which had been previously levied. But in that case the replevin suit was still pending.

Neither of the cases referred to, decide the precise point involved in this case. In the first three cases, the plaintiff in replevin was the *general owner* of the goods, and as such had an unquestionable legal right to sell or dispose of them without a replevin, subject to the *lien* acquired by the defendant in replevin by his distress for rent; therefore, in those cases there is some and perhaps an entire propriety, in saying, that the lien by the distress was extinguished by the replevin and that the bond was a substitute for it, especially as the goods had been sold or disposed of by the general owner during the pendency of the suit and third persons had acquired rights in them.

In the other case, *White* the plaintiff had purchased the property in question of Jessup, the general owner, and left it in his possession. But a few days prior thereto, Hillyer as Sheriff, under an execution against Jessup, had levied upon it

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and soon after White's purchase took possession of it, for which, White brought replevin against him, to whom, under it, the property was delivered, and who again left it in the possession of Jessup; the replevin suit was tried and a verdict for Hillyer found, instead of taking judgment for a return, he elected to take an assessment for the value of the goods; White made a motion for a new trial which was undecided, when Acker subsequently as Sheriff under an execution against Jessup upon another judgment, levied on the same property still in his possession; for which, White brought replevin against him and obtained a verdict and judgment in the Superior Court of New York; on error, the Supreme Court held, 1st, that White independent of his purchase of Jessup, should be regarded as having all the interest in the goods which belonged to Sheriff Hillyer under his *fi. fa.* and if that was sufficient to defeat the levy of Acker on his *fi. fa.* it equally enured to the benefit of White. That the bond was substituted for the goods, and was conditioned among other things, to *return the property* if adjudged against him—and although the lien of the execution was gone according to the cases cited, *it was because it was regarded as an equivalent security* for the satisfaction of the judgment to the extent of the value of the goods. That it would seem, therefore, but just and equitable that the interest to the extent of the lien should pass to the party thus giving the security and asking a deliverance according to law. And 2nd, the goods being in the custody of the law under a valid levy by Hillyer, who was entitled to the exclusive possession of the same, the defendant Acker could not acquire any new right to the possession while that claim existed, in full force, to be satisfied either out of the property by a return, or the security given therefor.

The case of Lockwood vs. Perry, (9 *Metcalf*, 440) in principle, bears a nearer resemblance to this case, than the cases above referred to. There Lockwood was the owner of two colts,—one Barnes claimed them as his property, and by a writ of replevin issued out of the Common Pleas in Columbia

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County in this State, the Sheriff took the colts from Lockwood and delivered them to Barnes. The action was tried, and the plaintiff Barnes recovered a judgment, in that Court; the defendant brought error to the Supreme Court where the judgment was reversed and a *venire de novo* was awarded,—before a trial was had, Barnes died insolvent while the suit was thus pending, having previously sold the colts to the defendant Perry; after the death of Barnes, and before Lockwood brought the suit, he demanded the colts of Perry, which he refused to deliver. He then brought replevin for the colts. The colts were never the property of Barnes, nor had he any right to the possession of them, unless he acquired a property in them by virtue of his action of replevin. It was held that Perry acquired no title to the colts by purchasing them of Barnes.

The Court in that case, said, that the position taken by the defendant, that the object and purpose of the writ of replevin were to transfer the possession of the article replevied to the plaintiff in replevin, was certainly well maintained, if by possession, be understood, a possession for the time being. That the further position that the plaintiff in replevin, after the service of the writ, has a right to sell the property thus replevied, and may give to the purchaser a good indefeasible title, which would not be affected by a judgment in favor of the defendant in replevin, was one more difficult to be sustained. That if it were limited to replevin in cases of wrongful distress of personal chattels for rent, or of cattle damage feasant, it might be more readily assented to, as in such cases the property is held by the defendant in replevin for a particular purpose, and he does not claim to be the owner of it; and where the plaintiff in replevin, who in such case is the actual owner, has given the requisite security, by a bond, to pay such rent, or such damages, if the property is not returned, it might be all that was requisite to do perfect justice between such parties. That a plaintiff in replevin, who was the *real owner* of the property, might deal with the goods as his own, and make a legal transfer. But that did not sanction the

broad doctrine, that by reason of the mere fact that he had acquired his possession through writ of replevin, his vendee acquired thereby an indefeasible title as against every body. That by the writ of replevin the plaintiff acquired the right of possession pending the action of replevin, and that the real owner could not lawfully disturb that right during the pendency of the action, nor institute an action against a third person who might become possessed of the goods; and that was the extent of the right exercised by force of a writ of replevin.

It was further held that the abatement of the replevin suit, by the death of the plaintiff, operated to defeat a right of possession of a chattel acquired under a writ of replevin, having no other foundation besides that which results from such writ; and that the defendant, under such circumstances, may avail himself of his antecedent title, as the lawful owner, to regain the possession, although he may not have a judgment for a return of the property, provided he was content to resort to the property itself, and forego his remedy upon the bond.

In the case at bar, it has been shown that this property on which the defendant levied belonged to Burkle; and as such the defendant had an unqualified right to it for the satisfaction of the creditor's judgment. Mrs. Seitz, without any right to the property as against the creditor, availed herself of the action of replevin to obtain possession of it.

The suit having abated by her death, and she not having sold the property, but dying possessed of it, the plaintiffs as her executors succeeded to her rights and nothing more. In my opinion the proceedings upon the writ of replevin conferred upon her a mere temporary right of possession, which expired with the abatement of the suit by her death, and that, when that event occurred, the lien of the execution revived. Especially as the rights of no third person had intervened under her, and that the defendant was at liberty to retake the property by virtue of his former levy. I concur with the opinion expressed in this case (6 *Hill* 558) "by the Supreme

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Court that if he could not regain possession peaceably, he might after a demand, bring trover or replevin against the executors, or against any one else who had acquired no rights under Mrs. Seitz while the action was pending, or under her representation afterwards. Upon the operation of these principles no one is exposed to sustain any injury, for if the defendant retakes the goods, a remedy is open to the plaintiffs representatives to test the right by suit, but the principle for which the plaintiffs contend, would without any remedy work a wrong. The defendant as Sheriff is justly entitled to the goods for the satisfaction of the execution in his hands under which he first seized them, and has no remedy either by judgment, or upon the replevin bond. If his lien did not thereby revive, by which he could retake or sue for the goods in case they were withheld from him by the representatives of the plaintiff, he would, although he had an indisputable right to the goods, be without any remedy.

It is objected by the plaintiffs, that the Circuit Judge erred in refusing to charge the jury in respect to the question of fraud as requested; I am unable to see any ground for the objection; he left the whole question to them with proper instructions as to the law of the case, not indeed in the language of the request, but in a manner as I think better calculated to enable the jury rightly to comprehend the question and their duty and province.

The execution in favor of Rathbun against Burkle was properly received in evidence. It was a substitute for the original ordered to be issued by the Supreme Court. There was no necessity of proving the loss of the original execution upon the trial in order to give in evidence its substitute. This substitute was admissible as primary evidence, and therefore it is unnecessary to decide whether a proper foundation was laid for its admission as secondary evidence. (*Jackson vs. Hammon*, 1 *Caim. R.* 496; *White vs. Lovejoy*, 3 *Johns. R.* 448; *Love vs. Little*, 17 *Johns. R.* 346; *Chichester vs. Cande*, 3 *Cow. Rep.* 39.)

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There is no error in the judgment of the Supreme Court and it should be affirmed.

Judgment affirmed.

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A. was indicted in the city of New York for obtaining money from a firm of Commission Merchants, in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of and subject to the order of the firm. The defendant pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been within the State of New York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New York, by an innocent agent of the defendant, employed by him while he was a resident of and actually within the State of Ohio; *held*, that the plea was bad, and that the defendant was properly indicted in the city of New York.

Where an offence is committed within this State by means of an innocent agent the employer is guilty as a principal, though he did no act in this State, and was at the time the offence was committed, in another State.

In such case the Courts of this State have jurisdiction of the offence, and if the offender comes within the limits of the State, they have also jurisdiction of his person, and he may be arrested and brought to trial.

Where an offence is committed within this State, whether the offender be at the time within the State, or be without the State and perpetrates the crime by means of an innocent agent, it is no answer to an indictment that the offender owes allegiance to another State or sovereignty.

ERROR from the Supreme Court. Adams and one Seymour were indicted in the New York General Sessions for obtaining money, by false pretences, of Suydam, Sage & Co., Commission Merchants in the city of New York. The pretence used to effect the fraud, was, as the indictment alleged, a false receipt signed by Seymour, dated at Chillicothe, Ohio, acknowledging that he (Seymour) had received from Adams a large quantity of pork and lard, irrevocably subject to the order of Suydam, Sage & Co., which, by the same receipt, he agreed to forward to them in New York, and which they were to receive for sale on commission, and to have a lien upon for

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the amount of certain drafts drawn upon them by Adams against the property. The indictment alledged that the receipt was untrue, that Seymour had received no such property, and that the defendants knew it; also that Suydam, Sage & Co., upon the faith of the receipt, and the representations accompanying the same, accepted and paid the drafts.

Adams pleaded to the indictment, in substance, that he was born in Ohio, that he had always resided in that State, and had never been within the territorial limits of the State of New York; that the false receipt and the drafts mentioned in the indictment, were made and signed in the State of Ohio, and were presented to Suydam, Sage & Co., in New York, by an innocent agent of him, the said Adams, whereby they were deceived and defrauded, as alledged in the indictment, and therefore the plea insisted that he the said Adams, ought not to be criminally questioned or proceeded against in the State of New York.

On demurrer to this plea, the Sessions gave judgment in favor of the defendant, and the people removed the cause, by writ of error, into the Supreme Court, where the judgment was reversed, and the defendant ordered to further answer the indictment. *Sec 3 Denio* 190, where the pleadings are stated more in detail, and the arguments of counsel given at length.

Geo. Wood, for plaintiff in error.

Ogden Hoffman, and *John McKeon*, for the people.

GARDINER, J. No attempt was made upon the argument to controvert the reasoning of the learned Judge who delivered the opinion of the Supreme Court upon the premises assumed by him. It was however insisted, that the authority to punish on account of crimes committed within the jurisdiction of this State, depended upon the right of the State to the obedience of the criminal, and that the authority upon the one hand and the duty upon the other, was founded upon

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the allegiance permanent or temporary, which the offender owed to the country within which the crime was committed.

It was therefore admitted that a crime had been committed within this State and through the instrumentality of the defendant, and the authority of the numerous cases cited to establish the position, the *actual presence* of the offender at the place where the crime was consummated was not necessary to make him amenable to the law, was also conceded; but it was urged that they were adjudications in cases between sovereign and subject in reference to the municipal law of the country in which they arose, and that they did not touch the great question of allegiance which was anterior and paramount to any municipal regulation. No direct authority was referred to establishing this doctrine. We must therefore consider it as it was argued, as a question depending upon general principles.

Allegiance binds the citizen to the observance of all laws which are promulgated by his own sovereign, not inconsistent with the laws of nature. The laws of nature as they are denominated also rightfully require obedience, not by reason of allegiance, but because they emanate from a higher authority than any human government. They are written upon the hearts of all men; exist before governments are organized; anterior of course to allegiance, "and are binding all over the globe, in all countries and at all times."

To these laws all men owe obedience, not because they are subjects, but because they are men.

Allegiance itself is modified and controlled by them.

Every political and civil power has its legal limits, no man is bound to do any act contrary to the law of nature at the bidding of his sovereign. (*Vattel. B.*, 1 Ch. 4 § 53-4.)

The positive regulations of particular communities, such as their revenue and usury laws, indeed the whole class of regulations which render acts in themselves indifferent, criminal by prohibition, may to some extent derive their obligation from the doctrine of allegiance—and may therefore be binding only upon the citizens and residents of that community.

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But this is not so in reference to the higher laws to which I have adverted. The duty of obedience does not depend upon the allegiance of the subject, or the laws of his sovereign, but is assumed as pre-existing.

The citizen of Massachusetts who should murder an inhabitant of this State by the discharge of a loaded pistol or by striking with a deadly weapon across the invisible line which separates the territory of the two States, would transgress a law universally binding and recognised as such by the citizens of both States. If it be admitted as contended for by the counsel for the prisoner that the offender would not violate his allegiance to his own State, he would not be the less guilty on that account. He would, notwithstanding, infringe a law he was under an obligation to obey, at all times and in all places, in New York as well as in Massachusetts.

In a word, where the law of nature prohibits an act as criminal, it is the province of the municipal law of each State to prescribe the means by which the crime is to be ascertained and the punishment to be inflicted upon the offender.

This right is indispensable to enable a State to discharge the duty of protecting its own citizens. It is also exclusive: "The jurisdiction of a nation within its own territory," says Chief Justice Marshall, "is necessarily exclusive and absolute and the jurisdiction of its Courts is a branch of that sovereignty."

If a citizen is injured in his person or property by a foreign government or their avowed agents, redress may be sought through his own sovereign, and if refused it would be a cause for war. But when the injury arises from the fraud or malice of a private citizen, with whom or his acts his government has no connection, and the offence is consummated in the State of which the aggrieved party is a subject, no protection can be afforded except by the punishment of the offender if found within its limits. The aggrieved person cannot make reprisals, and the government of the offender is no more responsible for the tortious act of a private citizen than for his contracts. Protection therefore the "return" or

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consideration upon the part of the State for the obedience of the subject, cannot be secured at all upon the assumption that allegiance is the only ground of jurisdiction over the criminal.

The right to punish therefore it is believed, obtains in all cases where a law has been violated to which the offender owes obedience ; and secondly, where the offence is committed within the territory of the State claiming jurisdiction.

Piracy which is sometimes claimed as an exception, only confirms the general rule. Piracy is an offence against the law of nature, which is in this respect the law of nations. (*Story's Comm.* 3 Vol. Chap. 22 § 1153.) A pirate who is one by the law of nations may be punished in any country where he may be found. Why ? Because he has transgressed a law which he was bound to obey ; and secondly, because the offence was committed in a place in which all nations have a common right, but over which no one has exclusive jurisdiction. Each nation therefore must have the right to punish or none ; and the right is conferred upon each to prevent the escape of the offender.

Allegiance to a particular power, so far from drawing after it the exclusive jurisdiction to try and punish, is not even one of the elements necessary to confer it. A Pirate born in England where the crime is recognized and punished by the common law, (4 *Black. Comm.* 72) may be convicted and sentenced in the Courts of the United States or those of any other nation.

If a State may punish a foreigner who owes it no allegiance for acts committed on the highway of nations, there would seem to be no doubt of its jurisdiction when the offence was committed by *any means* within its own territory. Robbery upon land is as much opposed to the law of nature, as robbery upon the high seas. In each case the individual forfeits the protection of his government, and the difference of jurisdiction in the two cases is attributable to the right of domain, and not to the doctrine of allegiance. Vattel says that "the sovereign who is injured by the subjects of another nation, takes satisfaction for the offence himself when he meets

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with the delinquents in his own territory, or in a free place as the open sea." (*Book 4, Ch. 4, § 52.*) And again, after remarking that it would be unjust to impute to the sovereign every fault committed by a subject against a citizen of another country, he says, "if the offended State has in her power the individual who has done the injury, she may, without scruple, bring him to justice and punishment," (*Book 2, Ch. 6, § 75.*)

In this case the prisoner admits that by means of false pretences, and with an intent feloniously to cheat and defraud, he obtained, from citizens of this State, the sum of \$28,000 through the instrumentality of innocent agents. And it appears that afterwards he voluntarily came within the territory of the State where the crime was committed.

I think he may be rightfully punished. He has violated a law to which he owed obedience, for it was written upon his own conscience, and obligatory every where. To that law the statute of this State has affixed a penalty, to be enforced in her own tribunals for the protection of her own citizens.

The immunity he enjoyed at home from arrest and punishment, was not due to him as a criminal, or as a citizen of Ohio, but because he had injured no one whom that State was bound to protect, and because the inviolability of its territory was an essential to its sovereignty and independence. The prisoner knew that through his agent he was defrauding those who were entitled to the protection of our laws, and he cannot be permitted to say that he did not know that it was unlawful to cheat in New York as well as in Ohio.

BRONSON, J. As I have not found time to write out an opinion, I shall content myself with stating the conclusions at which I have arrived.

That a crime has been committed within this State, and by the defendant is not denied by his counsel. But they insist that he cannot be punished here, because he was a citizen of Ohio, and owed no allegiance to this State. I am of opinion that it is not a matter of any importance whether the defendant owed allegiance to this State or not. It does not

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occur to me that there are more than two cases where the question of allegiance can have anything to do with a criminal prosecution. First, where the accused is charged with a breach of the duty of allegiance, as in cases of treason; and second, where the government proposes to punish offences committed by its own citizens beyond the territorial limits of the State. When the offence, not being treason, is committed within this State, the question of allegiance has nothing to do with the matter.

It is not necessary to notice the peculiar relation which a citizen of one of the United States sustains to the other States; for if a subject to the British Crown, while standing on British soil in Canada, should kill a man in this State, by shooting or other means, I entertain no doubt that he would be subject to punishment here, whenever our courts could get jurisdiction over his person.

This leads me to say, that it is not necessary to inquire how the criminal can be arrested or whether he can be arrested at all. If our courts cannot get jurisdiction over his person, they cannot try him. But that is no more than happens when a citizen, who has committed an offence within the State, escapes, and cannot be found. Jurisdiction of the offence, or subject matter, and jurisdiction to try the offender, are very different things. The first exists whenever the offence was committed within this State; and the second, when the offender is brought into Court, and not before. And this is so, whether he be a citizen or not.

I am of opinion that the judgment of the Supreme Court should be affirmed.

Judgment affirmed.

Charles v. The People.

CHARLES impleaded with MCINTYRE vs. THE PEOPLE.

Under the Revised Statutes (1 R. S. 665, § 28) it is a misdemeanor to publish in this State an account of a lottery to be drawn in another State or Territory, although such lottery be authorized by the laws of the place where it is to be drawn.

Accordingly *held* that a demurrer to an indictment which charged the defendant with publishing, in the city of New York, an account of a lottery to be drawn in the District of Columbia, was not well taken.

Where the indictment charged the defendant with publishing an account of an illegal lottery, and set forth *in haec verba* the lottery scheme, which shewed that the prizes consisted of sums of money; *held good*, although it was not otherwise averred that the lottery was set on foot, for the purpose of disposing of money, land, &c.

Charles and McIntyre were indicted at the New York General Sessions for publishing an account of an illegal lottery. The indictment charged that the defendants on, &c., at the fourth ward of that city, in a newspaper called the "Wall Street Reporter," published an account of a certain illegal lottery, stating when the same was to be drawn, and where tickets were to be had, together with the prizes therein. It then set forth the account so published, *in haec verba*, from which it appeared that the prizes were of various *sums of money*, and were to be decided by the numbers drawn from the wheel of the Alexandria Lottery, to be drawn at Alexandria, in the District of Columbia. The indictment did not shew, otherwise than by setting forth the published account, that the lottery was set on foot for any of the purposes forbidden by the statute. (1 R. S. 665, § 27.) The defendant Charles put in a demurrer, which was overruled by the Sessions, and judgment given for the people. The Supreme Court, upon writ of error, affirmed the judgment, and the defendant brings error to this Court.

C. C. Egan, for plaintiff in error. 1. The statute only prohibits the publication of a lottery scheme which is set on foot within this State, and therefore the facts charged in the

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indictment constitute no offence. 2. The statute requires that the lottery shall be established for "the purpose of exposing, setting to sale, or disposing of houses, lands, money, or goods, or things in action," and the indictment is defective in not alleging that the lottery was set on foot for these purposes.

John McKeon, for the people.

WRIGHT, J. By the 26th section of article four, title eight, and chapter twenty, of the first part of the Revised Statutes, every lottery, game or device of chance in the nature of a lottery, *other than such as have been authorized by law*, is declared to be "unlawful and a common and public nuisance." The 27th section of the same article, makes it a misdemeanor for any person, *unauthorized by special laws for that purpose*," within this state, to open, set on foot, carry on, promote or draw, publicly or privately, any lottery, game or device of chance of any nature or kind, or by whatever name it may be called, for the purpose of exposing, setting to sale, or disposing of any houses, lands, tenements, or real estate, or any money, goods or things in action." The 28th section is as follows: "No person shall by printing, writing, or in any other way, publish an account of any *such illegal lottery* stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket or share therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same. Whoever offends against this provision shall be deemed guilty of a misdemeanor," &c.

In 1830, when the Revised Statutes went into operation, there were special laws in existence authorizing within the State, certain lotteries. This fact explains the reason for the exceptions in the 26th and 27th sections above cited. But in 1833, the legislature provided that after the close of that year, "it should not be lawful to continue or draw *any lottery* within this State, but all and every lottery before granted or

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authorized should absolutely cease and determine." (*Laws of 1833, p. 484.*) Therefore, since the end of the year 1833, all lotteries have been unauthorized and contrary to law, and the sections of the Revised Statutes referred to above should be read as though the words, "other than such as have been authorized by law," in the 26th section, and the words "unauthorized by special laws for that purpose," in the 27th section, were stricken therefrom.

It is insisted by the plaintiff in error: First, That the facts charged in the indictment do not constitute an offence against the laws of this State, because the publication charged was of a foreign lottery, and the statute does not make such publication an offence. Second, That the indictment is defective in not averring that the lottery was one "for the purpose of exposing, setting to sale, or disposing of" property or money according to the description contained in the 27th section. Both of these points will be met in a decision of the question, whether the words, "any such illegal lottery," in the 28th section, refer to and point out only the particular kind of lottery or lotteries described in the 27th section, or whether they properly refer both to the 26th and 27th sections which include all lotteries; for if the "illegal lottery" spoken of in the 28th section be only that described in the 27th, and it is conceded that the publication was of a foreign lottery, there is no offence charged against the laws of this State, as the 27th section describes a lottery to be opened, set on foot, carried on, promoted or drawn, *within this State*, for specified purposes; and had the publication been of a lottery of this State, the indictment would have been defective in not averring the purpose for which the lottery was set on foot, &c. So, also, by the 26th and 27th sections, all lotteries being "unlawful and common and public nuisances," as far as there may be attempts to carry them on in the State, if the term "such illegal lottery," is meant to embrace all lotteries, made so by both sections, then the facts charged in the indictment do constitute an offence against our laws, and no special averment of the purpose of the lottery is necessary, but the general

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avement of publication would be sufficient; for the 28th section, under which the indictment is framed, then makes it a misdemeanor to publish an account of any lottery, game or device of chance in the nature of a lottery for any purpose whatever.

It is contended that the offence prescribed by the 28th section is only that described in the 27th, of "printing, writing or publishing an account" of a lottery set on foot, *within this State*, for the purpose of "exposing, setting to sale or disposing of" property or money. If this be so, though the giving notice of a lottery set on foot and to be drawn in the District of Columbia is within the mischief and against the policy indicated by the 27th section, yet not being an act *malum in se* nor in contravention of positive law, it is not criminally punishable. But I am of a different opinion. I think that the words, "such illegal lottery," relate not solely to the particular kind described in the 27th section, but to *all* lotteries; as all are by the 26th section declared to be "unlawful and common and public nuisances." Such is the relation given by the Supreme Court to similar words in the 29th section respecting the sale of tickets. (*People vs. Sturdevant*, 23 Wend. R. 418.) If the phrase, "*such illegal lottery*," in the 28th section were necessarily qualified by the description in the 27th section, and by no reasonable construction of language could relate to the 26th, I should not feel justified in an attempt to give it such relation. Though the mischief be as great to publish an account of a foreign as of a domestic lottery, it is for the legislature to determine whether one or both acts shall be a misdemeanor; and it is not for courts by a strained construction of language, or by an adoption of a false relation of words to each other or to the preceding sentences, to create a criminal offence not obviously within the letter or meaning of the statute. But for ought that I can discover, the phrase "*such illegal lottery*," in the 28th section may as aptly relate to all lotteries, which by the 26th section are declared to be unlawful, as to the particular description of lottery which the 27th section makes specially an offence to open, set on foot, carry on, promote or draw; and if the impediment I have

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suggested to such construction does not really exist, and the words may as well relate to the descriptions in the 26th section which embraces all lotteries, as to the 27th which includes only a particular kind, it would certainly be erroneous, in view of the fact that the mischief which the law intended to prevent is the same by the publication of an account of a foreign as of a domestic lottery, to narrow or limit the offence prescribed in the 28th section, to the publication of an account of a lottery set on foot, within this State, for specified purposes.

I think that by printing, writing, or in any other way to publish an account of *any lottery*, "stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket or shares therein, or where any ticket may be obtained therein, or in any way aiding or assisting in the same," is an offence under the 28th section of the statute, and that consequently a general averment in the indictment of publication is sufficient.

The judgment of the Supreme Court should therefore be affirmed.

BRONSON, J. The defendant insists that our lottery act does not forbid the publishing an account of any lottery, except such as are opened, set on foot, or drawn within this State. (1 R. S. 665, § 28.) He makes the word "such," in the 28th section, refer, among other things, to the words "within this State," in the 27th section. But the words "within this State," as there used, neither add nor take away any thing from the force of the section. Our Legislature has no extra-territorial jurisdiction; and when it forbids, in unqualified terms, the doing of an act, it must always be understood that the thing is only forbidden within this State. The Legislature has in this instance only expressed what is usually left to implication. The words "such illegal lottery," in the 28th section, refer to lotteries for disposing of money or property, which had not been authorized by the laws of this State; and all other gaming lotteries are illegal here, though they may have been authorized by the laws of other States.

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This point was decided in *The People vs. Sturdevant*, (23 *Wend.* 418;) and I see no reason for questioning the authority of that case. (*See also, Commonwealth vs. Dana*, 2 *Metc.* 329, 338.)

The indictment does not directly and expressly allege that the lottery, of which the defendants published an account, was opened or set on foot for the purpose of disposing of money or other property. (*The People vs. Payne*, 3 *Denio* 88.) But that fact appears from the advertisement itself, which is set out at large in the indictment; and according to the decision in *The People vs. Rynders*, (12 *Wend.* 425,) this is good pleading, even in a criminal case. Although, as an original question, I should probably have come to a different conclusion, I am content to follow the authority of that case.

I am of opinion that the judgment of the Supreme Court should be affirmed.

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Coddington vs. DAVIS and others.

In a strict and technical sense, the term *protest* when used in reference to commercial paper, means only the formal declaration drawn up and signed by a Notary, but in a popular sense and as used among men of business, it includes all the steps necessary to charge an endorser.

Therefore, where an endorser of a note, before its maturity, wrote to the holder, saying: "Please not protest T. B. C.'s note due, &c. &c., and I will waive the necessity of the protest thereof," *held*, that this dispensed with a demand of the maker and notice to the endorser.

A demand of payment from the maker of a note, and notice to the endorser, are sufficient to charge the endorser, without a technical and formal protest.

Where two instruments are executed on different days, relating to the same subject matter, and the one last executed refers to and is based upon the former one, in arriving at the intention of the parties in the latter instrument, both should be read and construed together; and the general words, used in the last, should be restricted so as to conform to the intention of the parties as derived from an examination of both instruments.

Accordingly, where the maker of a note made an assignment to one of the holders for the benefit of his creditors, in which the *endorser*, was named and preferred as a creditor to the amount of the note, and the *holders* were named and preferred as creditors on another account, but were no where set down as creditors in respect to the note, and the holders in conjunction with other creditors afterwards executed to the maker an instrument referring to the assignment, and agreeing in consideration thereof, and of one dollar, to discharge the maker from *all claims and demands* existing in their favor respectively against him, over and above what they might realize under the assignment, on his agreeing at the same time to pay the balance of their debts in seven years, and the maker at the same time gave to the holders his written promise to pay such balance in seven years; *held*, that the claim of the holders to recover the note of the maker was not discharged or suspended, the instrument being regarded as only applicable to their other demand against the maker; and therefore *further held*, that their right to recover against the endorser was not affected by such instrument.

On error from the Supreme Court. Davis, Brooks & Co. sued Samuel Coddington in the Superior Court of the city of New York as the endorser of a promissory note for \$10,000, made by Thomas B. Coddington, which bore date Dec. 31, 1839, and became due Feb. 2, 1840. On the trial it was proved that on the 28th of January, 1840, the defendant wrote to the plaintiffs as follows:

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"Messrs. DAVIS, BROOKS & Co.—GENTS.: Please not protest T. B. Coddington's note due 2d February, 1840, for ten thousand dollars, and I will waive the necessity of the protest thereof; and oblige,
Yours,

SAM'L CODDINGTON."

The plaintiffs having rested, the defendant moved for a nonsuit on the ground that no demand of the maker and notice of non-payment to the endorser had been proved. The Court held that the above letter dispensed with the necessity of making such proof, and denied the motion. The defendant excepted.

It was then proved on the part of the defendant, that on the 23d day of January, 1840, the maker of the note assigned his property to one Charles Davis, one of the plaintiffs, in trust to pay his debts, preferring certain creditors named in schedule A, annexed to the assignment. The assignment and schedules were read in evidence, from which it appeared that the defendant was named as a creditor in schedule A in the sum of \$10,000, the amount of the note in question, and in two other sums of smaller amount. The plaintiffs were named in the same schedule as creditors in the sum of \$1000, and in schedule B in two other sums of \$1100 and \$900; but they were no where named as creditors in respect to the note in question. On the day after the assignment was executed (January 24th) the defendant drew an order upon the assignee, in favor of the plaintiffs, directing him to pay over to them all monies which he might realize out of the fund assigned on account of the defendant, to the amount of \$10,000. This order was accepted by the assignee, and in pursuance thereof he had paid over to the plaintiffs previous to the trial about \$2,800, which they had applied to the note.

On the 8th of February 1840, the plaintiffs and other creditors of Thomas B. Coddington executed to him an instrument without seal in these words: "Whereas, Thomas B. Coddington, of the city of New York, is indebted or liable to us for certain debts or liabilities heretofore incurred by said Coddington, and said Coddington has made an assignment of

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his property to Charles Davis, Esq. for the benefit of us and other creditors of said Coddington; Now in consideration of one dollar paid to us by said Coddington, the receipt of which is hereby acknowledged, and in consideration of said assignment and a promise on the part of said Coddington hereinafter mentioned, We, the creditors, whose names are hereunto subscribed, do hereby release, discharge and forever acquit said Coddington, his executors, &c., from all claims, demands, liabilities, engagements, judgments, and other responsibilities now existing against said Coddington, beyond what we shall respectively realize of said claims, &c., from said assignment to Charles Davis, dated the 28d of January, 1840; we receiving or assenting to the conditions of said assignment, and coming under the same for a full and perfect discharge of said claims, &c., said Thomas B. Coddington, in consideration of the above, giving us severally a written promise to pay us at the expiration of seven years from the date of this instrument, whatever balance of said claims should remain unpaid, out of the assets of said assignment. Witness our hands, this eighth day of February, 1840.

Signed by Davis, Brooks & Co., and by other creditors.

Simultaneously with the execution of the above instrument Thomas B. Coddington executed to the plaintiffs the written promise therein referred to, in these words: "I hereby promise to pay Messrs. Davis, Brooks & Co. whatever they may not realize from my assignment to Mr. Charles Davis, on account of my indebtedness to them, in notes, books, accounts, endorsements, or otherwise at the expiration of seven years from the date hereof. THOMAS B. CODDINGTON."

"New York Feb. 8, 1840."

The above matters being given in evidence, the defendant's counsel insisted, that the written instrument of the 8th of February, was a valid release and discharge of the maker of the note, and that thereby the defendant, the endorser, was discharged from his liability. Also that said written instrument in connection with the maker's promise to pay any balance, &c., in seven years, was a valid extension of time to the

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maker of the note, which discharged the endorser. Also that the plaintiffs having by said instrument agreed to come in under said assignment for a full and perfect discharge of all their claims against said Thomas B. Coddington, could not sue on the note or endorsement until the assignment was closed. The Superior Court overruled these positions, and the jury found a verdict for the plaintiffs. The defendant excepted and had a bill of exceptions duly signed and sealed. The Supreme Court on writ of error affirmed the judgment of the Superior Court. (*See 3 Denio 16.*)

S. Stevens and *L. Livingston* for plaintiff in error.

Charles O'Connor for defendants in error.

GARDINER, J. The Plaintiff in error, the defendant below, was the endorser of a note made by Thomas Coddington for \$10,000. Thomas Coddington failed, and on the 23d January, 1840, made an assignment to Davis, one of the firm of Davis, Brooks & Co., the endorsees and holders of the note and the plaintiffs below. On the 28th of January, and prior to the maturity of the note, the defendant with full knowledge of the above facts, wrote the following letter :

"Messrs. DAVIS, BROOKS & Co.—GENTS: Please not protest T. B. Coddington's note due 2d February, for ten thousand dollars, and I will waive the necessity of the protest thereof; and oblige respect'ly, &c.,

SAMUEL CODDINGTON."

The construction of this letter is the first important question presented in the cause.

The term protest in a strict technical sense is not applicable to promissory notes. The word, however, as I apprehend, has by general usage acquired a more extensive signification, and in a case like the present includes all those acts which by law are necessary to charge an endorser. When among men of business a note is said to be protested, something more is understood than an official declaration of a notary. The expres-

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sion would be used indifferently to indicate a series of acts necessary to convert a conditional into an absolute liability, whether those acts were performed by a mere clerk or a public officer. It is obvious that the word was used in its popular acceptance by the defendant below. He requests the endorsees "not to protest the note, and that he would waive the necessity of the protest thereof."

The protest to which the endorser alluded was something "necessary" to be done, something also for the benefit of the endorser, for he assumed to waive it. It could not therefore be a memorandum, or declaration made by a notary, because neither of them were required. Nor could he have intended to waive that which whether performed or omitted, his right would in no manner be affected. The only things necessary on the part of the endorsees was a demand of payment of the maker, and notice to the endorser. By waiving the necessity of protest the defendant dispensed with both, or his communication is destitute of all meaning.

It was argued indeed that the defendant might have referred to the notarial certificate authorised by statute. But this certificate is made *prima facie* evidence of a demand and notice in favor of the endorsees. It is for their benefit. The defendant in making such reference must have supposed that the certificate was *necessary evidence*, because he waives the necessity of a protest, which according to the argument is equivalent to dispensing with the necessity of a notarial certificate. Now to every fair mind, waiver of proof necessary to establish a particular fact, is equivalent to an agreement to admit it. Whether therefore the defendant by waiving the necessity of a protest, intended to dispense with demand and notice, or with the evidence of them the result would be the same, and in either case he is concluded by his own stipulation from raising the objection taken upon the trial. I agree with the learned Judge who delivered the opinion of the Supreme Court, that the circumstances attending the written stipulation of the defendant confirm this view; but I prefer to rest my opinion upon the letter alone, as furnishing *prima facie*

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evidence of an intent by the endorser to waive demand of payment and notice to which he was otherwise entitled.

Another important point is made by the defendant, that the written statement signed by the plaintiffs and others, dated 8th February, 1840, was a valid discharge by the plaintiff of Thomas Coddington the maker of the note from all liability thereon, and consequently of the endorser. On the 28d of January, 1840, Thomas Coddington executed his assignment to Davis, and directed his assignee to pay and discharge the *debts owing by the assignor* contained in the schedule marked A. in equal proportions. In this schedule we find:

SAMUEL CODDINGTON, for endorsement,	\$10,000
“ “ “	1,854
“ “ Balance of account,	2,178

Taking the schedule in connection with the assignment, it will be perceived, that the debts to the defendant for endorsements and for private account, are placed upon the same footing as debts *owing by the assignor* to the defendant, and both are directed to be paid absolutely. It is obvious therefore that the \$10,000 endorsement, which is admitted to be the note in question, was understood by the parties to the assignment to be the debt of the defendant and treated accordingly. This was on the 28d January: on the 24th, the defendant in writing, directed Davis as assignee to pay to the order of Davis, Brooks & Co., all *monies* that should be received by him as assignee *on his account*, to the extent of \$10,000 value received.

By this act the defendant not only assented to the assignment, but as it appears to me, distinctly recognised the relation in which he was placed by that instrument as creditor to the assignor to the amount of the \$10,000 unconditionally, and of course liable for the same amount to the plaintiffs. He directed the payment of a sum equal to the note, not only out of the fund set apart in the assignment for that purpose, but out of the proceeds of the property exclusively applicable to the discharge of a debt due to him individually, for a bal

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ance of account. In a word, he recognized this as a debt due from Thomas Coddington to *himself*, by claiming under the assignment by which it was so declared, and as a debt due *from him* to the *plaintiffs* by a voluntary application of his private funds to its payment. In conformity with this view of his rights and liability, we find him on the 28th day of January, the date of his letter to Brooks, Davis & Co., waiving the necessity of protest, and thus converting a conditional into an absolute liability upon his part, for the payment of this note to the plaintiff.

Under these circumstances the discharge of February 8, 1840, was executed by Davis in behalf of Davis, Brooks & Co., and by some others of the creditors of T. Coddington.

This instrument, which is without seal, recites in substance, that T. Coddington was *indebted* or *liable* to the subscribers, and that he had made an assignment to Davis for the *benefit* of the subscribers and other *creditors*, and in consideration of one dollar, of said assignment, and of a promise to pay any balance that might not be received under the same, in seven years—the subscribers did release and discharge and forever acquit the said T. Coddington, from all claims, demands, liabilities, engagements, judgments, and other responsibilities then existing against him, beyond what they might realize on said claims, &c., from said assignment; “We,” the instrument proceeds, “receiving and assenting to the *conditions* of said assignment, and *coming in under the same*, for a full and perfect discharge of our said claims. The said Coddington, in consideration of the above, giving to us his written engagement to pay the balance;” &c.

It is apparent that this discharge refers to and absolutely adopts the assignment, with all its conditions, and provisions as its basis. One of these conditions was, that the defendant should be paid out of the fund, as a preferred creditor, the amount of this note as a debt due to *him*. To this the parties to the discharge expressly assented. When, therefore, it was recited in that instrument that Thomas Coddington was indebted or liable to Davis, Brooks & Co., for certain *debts*,

and that the former had made an assignment for the benefit of the latter as *creditors*, the parties could not have referred to this demand which they had agreed to describe and had actually inventoried as the debt of another.

It may be granted that independent of the assignment, the plaintiffs as to this note were the principal creditors of Thomas Coddington. But we must seek the intention of the parties in their writings, not in the relation previously existing. When therefore the assignment, as we have a right to infer, purposely omits Brooks, Davis & Co., and substitutes the defendant as the *creditor* to whom this *debt* was *owing*; the discharge upon authority as well as the plainest principles of justice should be restricted to the relations established by the instrument to which it refers and expressly adopts. (*Taylor vs. Homersham*, 4 *Maule* 1 *Selwyn* 422; 23 *Com. Law R.* 50, 7 *Com. Law* 205, 1 *Cowen* 123, 126.)

The engagement entered into by Thomas Coddington at the time of the execution of the release confirms this view. By that he promised to pay Brooks, Davis & Co., whatever they might not realize from his assignment, on account of his *indebtedness to them*. This debt of \$10,000 had been inventoried as due to S. Coddington. To suffer Brooks, Davis & Co. to share equally with the creditors of the second class, upon the ground that this debt was due to them also, would be virtually a fraud upon those creditors, upon the assignor, and those who executed the discharge with Brooks, Davis & Co. These creditors with justice could say to the plaintiffs, that with their concurrence the assignor had appropriated property for the payment of this debt to the defendant. You have elected to claim through him, to which he has assented, and you are bound by your election.

It is unnecessary therefore to consider the objection of a want of consideration, &c., raised to this discharge. Viewing it as legally binding upon the parties, it does not extend to this demand, and cannot have the effect either to discharge or extend the time of payment of the note in question. The judgment of the Supreme Court should be affirmed.

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BRONSON, J. also delivered an opinion in favor of affirmance; and JEWETT, Ch. J., JONES and WRIGHT, Js., concurred.

RUGGLES, J., dissenting. If the instrument called the discharge, dated on the 8th of February, 1840, signed by *Davis, Brooks & Co.*, did not absolutely and entirely discharge *Thomas B. Coddington* from all liability on the ten thousand dollar note as maker, it operated, beyond a doubt, as it appears to me, to extend the time for the payment of that debt until the expiration of seven years from the date of the instrument. So far as respects the right of *Davis, Brooks & Co.* to recover against *Samuel Coddington* the endorser, it is immaterial whether it is an entire discharge or an extension of time. In either case the action against the endorser is barred, and unless the suit on the note could have been maintained by *Davis, Brooks & Co.* against *Thomas B. Coddington*, the maker, then action against *Samuel Coddington*, the endorser, must fail.

Want of consideration furnishes no good ground of objection to the validity of the discharge. The pecuniary consideration expressed in it, is alone sufficient, although nominal in amount, it was inserted doubtless for the purpose of giving validity to the instrument, and is as effectual for that purpose as if it had been a larger sum. If the instrument had been under seal, the parties would have been estopped from denying it. Not being under seal that rule may not apply. But the recital in the instrument is evidence of payment until proof be given to the contrary, and no such proof was offered. The sum of one dollar, expressed as the consideration, is not a part of the debt to be paid, but a separate and independent sum; and the creditors cannot now avoid this agreement on the ground of want of consideration, without committing a manifest fraud upon *Thomas B. Coddington*. The assignment is also a sufficient consideration to support the agreement. If it should be answered that this was a past consideration, not appearing on the face of the instrument to have been made at the request of the creditors, the answer is, that if the objection had been made at the trial, no jury would have hesitated

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a moment, from the beneficial nature of the transaction, to have inferred a request.

Let us then look at the discharge with a view to ascertain whether *Davis, Brooks & Co.* could, after having executed it, and within the seven years mentioned in it, have sued *Thomas B. Coddington*, the maker, upon the note in question.

First. It was admitted on the argument by the counsel for the defendants in error, that the words in the body of the instrument, if considered alone, were abundantly sufficient to comprehend and include the note in question, and to acquit the maker of any liability at least during the period of seven years. It purports "to release, discharge, and forever acquit him from all claims, demands, liabilities, judgments, and other responsibilities now existing against said Coddington." But these comprehensive words were supposed to be limited and restrained in their effect by something in the recital. Let us refer to it. The recital is, "that Thomas B. Coddington is indebted to us for certain debts and liabilities heretofore incurred." *This certainly embraced the \$10,000 note.* The recital then proceeds, as follows: "And said Coddington has made an assignment of his property to *Charles Davis, Esq., for the benefit of us* and other creditors of said Coddington," &c. Now the question arises whether the assignment was made for the benefit of *Davis, Brooks & Co.*, as well in respect of this \$10,000 debt, as with respect to the other debts he owed them, and which were mentioned in the schedules. The assignment was for the benefit of those who were to take the dividends, and if they were entitled to the dividends on that debt as well as on the others, then it follows that the recital, instead of excluding the \$10,000 debt from the operation of the discharge, brings it conclusively within its scope and meaning.

Here it becomes necessary to refer to the assignment and schedule annexed to it; for it was rightly said by the Supreme Court in its opinion on this case, that the assignment being referred to in the discharge, both papers should be examined for the purpose of ascertaining the intention of the parties.

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The trust created in the assignment is that the assignee, "out of the monies realized from the property, shall pay and discharge the debts owing by me, the said *Thomas B. Coddington*, mentioned and contained in the schedule hereto annexed, marked A, and if there should not be sufficient to pay said debts in full, then to pay them in equal proportions according to their amounts."

Schedule A is as follows:

Samuel Coddington for endorsement,	\$10,000 00
do. do. do.	1,185 44
do. do. for balance of account	2,178 40
	<hr/>
	13,863 84
Davis, Brooks & Co.,	\$1,000 00
James Taylor for account,	373 79
Joseph Meeks for rent,	250 00

It was assumed, upon the argument, and treated by all parties as an undisputed fact, that the \$10,000 debt in schedule A, opposite the name of Samuel Coddington, as endorser, is the debt due upon the note in question; and it is to be observed that although the debt is set down in the schedule opposite the name of Samuel Coddington, he is not set down as a creditor in the ordinary sense, but he is shewn by the entry to be an endorser. It does not appear, however, in the case that his name was put into the column of creditors by his act or with his consent. It was the act of the parties to the assignment, and not his; and they knew that he was in fact an endorser merely and not a creditor. But the debt was nevertheless preferred. It stood at the head of the preferred schedule. And for whose benefit? or in other words, who were entitled to the dividends accruing upon it under the assignment? Most undoubtedly *Davis, Brooks & Co.*, and they only. They were the creditors. *Thomas B. Coddington* was the debtor, and *Samuel Coddington* the surety. It is a well settled principle of equity that the creditor is entitled to the benefit of all the securities which the principal debtor has given to his surety; and if it be supposed that one of the ob-

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jects of the assignment was to secure *Samuel Coddington*, as endorser, the assignment immediately enured to the benefit of *Davis, Brooks & Co.*, the creditor; and they were as much entitled to the avails of the assignment, and to the control of it, as if their names had been put down in the schedule as creditors. (*Burge on Suretyship* 324; 1 *Story's Eq. Com.*, Sec. 502; *Pitman on Pr. and Surety* 89, 113.)

As soon as a dividend was declared, the share set apart to this debt was payable instantly to *Davis, Brooks & Co.* The assignee (one of that firm) had the power and the right so to apply it. *Davis, Brooks & Co.* could lawfully require it to be so applied. *Samuel Coddington* had no right to require it to be paid to him. The effect of the assignment, therefore, is in all respects the same as if *Davis, Brooks & Co.* had been named in schedule A, instead of *Samuel Coddington*, as creditors for the \$10,000 debt; and without reference to the order by which *Samuel Coddington*, on the 24th of January, directed the assignee to pay the dividends to them, the assignment, was as much for their benefit in regard to this debt as if *Samuel Coddington's* name had been omitted, and theirs inserted as creditors; and being so, the note in question comes as well within the letter as within the spirit of the recital in the discharge. The recital refers to the assignment in general terms, but not to the schedule specially. It does not point to the debts *standing in the name of Davis, Brooks & Co.*, as the debts on which the discharge was to operate, but to the debts due from T. B. Coddington to them, and upon which the assigned property was to be applied. Indeed, nothing can be clearer to my mind than that the discharge was to operate upon all the debts on which the creditors who signed it were entitled to dividends. The assignment was mainly the consideration on which the discharge was founded, and upon no other construction can the two instruments have a consistent and harmonious operation. It will be borne in mind that the order made by *Samuel Coddington*, on the 24th of January, directing his dividends to be paid to *Davis, Brooks & Co.*, had no effect whatever upon the dividend to be paid on the

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\$10,000 debt. Before that order was given, and without any aid from it, that dividend belonged to them, by the legal operation of the assignment. But the order was effectual to give to *Davis, Brooks & Co.* the dividends upon the other debts in schedule A standing in *Samuel Coddington's* name; and for that purpose only it ought to be understood to have been made, because for every other purpose it was a dead letter.

In the opinion delivered in the Supreme Court it is said to be evident, from what transpired between *Samuel Coddington* and the plaintiffs, that both the Coddingtons treated this as the proper debt of the defendant to the plaintiffs, and that it was not at that time considered as a debt against T. B. Coddington. But I find no evidence in the case shewing that *Samuel Coddington* so treated it. It has before been observed that the insertion of his name in schedule A, in connection with the note in question, does not appear to have been his act, or done with his assent. His waiver of the protest recognizes himself as the endorser, and *Thomas B. Coddington* as the principal debtor. The purpose of the order to pay over the dividends to the plaintiffs, has already been adverted to; and the discharge of *Thomas B. Coddington* by the creditors appears, as far as the evidence goes, to have been made without his knowledge or concurrence. There never was any assumption on his part to pay the debt except in his character as endorser; and it is in that character only that the plaintiffs have sought in this suit to make him responsible; and unless the note in question then was and now is due from *Thomas B. Coddington*, as principal debtor, they must fail.

If the assignment of the 28d of January, and the order made by *Samuel Coddington* on the following day, should, from the dates or otherwise, be regarded as part of the same transaction, and be looked upon as evidence that *Samuel Coddington*, as well as the parties to this suit, were privy to the execution of the assignment and to the making of schedule A, then, on that hypothesis, another conclusion follows equally fatal to the plaintiffs. It is this, that it must have been understood and agreed between all the parties at the time that

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Davis, Brooks & Co. were to have the dividends on the \$10,000 debt. This effectually brings that debt within the terms of the discharge and its recital.

It was urged upon the argument that *Davis, Brooks & Co.* could not have intended to discharge a solvent endorser by giving time to the insolvent maker of the note in question.

The solvency of the endorser is not a fact proved in the case. But if it were proved, the argument is entitled to very little weight when applied to the consideration of a written instrument. But when considered in connection with other facts proved in the case, it falls to the ground entirely. When the discharge was given, *Charles Davis*, one of the plaintiffs, held the assignment of property amounting nominally to \$32,000. The preferred debts, of which the note in question was a part, amounted to less than \$15,000; and by *Samuel Coddington's* order of the 24th of January, the plaintiffs became entitled to receive the dividends on other preferred debts due to him of between \$3,000 and \$4,000, and to apply them to the \$10,000 note in question. There was no proof of the insufficiency of the property assigned to pay the entire debt. Part of the assigned property remained, at the time of the trial, undisposed of, and the assignment had not been closed.

There is another paper in this case not yet mentioned which throws light on the question between the parties. It is the promise which Thomas B. Coddington gave in writing to the plaintiffs, at the time they executed the discharge, to pay at the expiration of seven years, the balance of his indebtedness to them which might be left after deducting what might be realized from the assignment. A reference to that instrument will shew that like the discharge and its recital, it was evidently intended to include the note in question.

Finally. From reading the three instruments together, that is to say the assignment and schedules, the discharge and the written promise of T. B. Coddington, I am brought to the following conclusions :

First. That by the assignment and schedules, without reference to any other paper, *Davis, Brooks & Co.* were entitled

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to the dividends on the \$10,000 debt, mentioned in schedule A as the creditors of *T. B. Coddington*, although that debt was set down against the name of Samuel Coddington as endorser.

Secondly. That by the recitals in the discharge, *Davis, Brooks & Co.* referred to the debts due from T. B. Coddington to them, of which this was the principal one, and therefore include this debt; that they do not refer to the debts set down to the names of *Davis, Brooks & Co.*, and therefore do not exclude it.

Thirdly. That the operative words in the body of the discharge are amply sufficient to include the debt in question, and do include it.

Fourthly. That the obvious meaning of the discharge was, that it should operate on all the debts on which the creditors who signed it were respectively entitled to dividends; and

Fifthly. That *Davis, Brooks & Co.* in conformity with this construction, took Thomas B. Coddington's written promise to pay, at the end of seven years, the balance that might remain due on this note, and on his other debts, after deducting what might be realized from the assignment.

I am therefore of opinion that the judgment of the Supreme Court should be reversed, and that a new trial should be awarded.

GRAY and JOHNSON, Js., were also for reversal.

Judgment affirmed.

**BOUCHAUD, Executor, &c., Appellant vs. DIAS and FURMAN,
Respondents.**

An assignment by a debtor, who is insolvent, of his property in trust for the benefit of a single creditor or surety, containing no provision for the benefit of creditors generally, is not within the act of Congress which declares the United States entitled to priority of payment, "in cases where a debtor not having sufficient property to pay all his debts shall make a voluntary assignment thereof for the benefit of his creditors."

Accordingly, where a debtor made such an assignment of his property, and his surety in certain Custom House bonds filed a bill, claiming that the United States had acquired a right to be first paid, and to be subrogated to that right on the ground that as such surety he had been compelled to pay the bonds; *held*, that the bill could not be sustained.

Costs on an appeal to the Court of Appeals are in the discretion of that Court and when the decree of the Court below is reversed, it should be without costs.

Appeal from Chancery. Joseph L. Dias and Job Furman, filed their bill in Chancery before the Vice Chancellor of the First Circuit, in which the case was stated in substance as follows:—Castro and Henriques, partners in trade in the city of New York, on the 13th day of May, 1823, made an assignment to Louis A. Brunel of a large amount of property in trust, firstly, to pay a debt which they owed Brunel; secondly, to pay two notes made by them and endorsed by him, and certain Custom House bonds given for duties upon goods imported by them, executed by Castro as principal and Brunel as surety; and lastly, to pay over or reassign the surplus of the effects assigned, to the assignors, or hold it upon such trusts as they should appoint. The debt and notes provided for amounted to \$6,873, and the Custom House bonds to \$30,626. The assignment made no provision for any other debts than those already specified, and the declared object of making such assignment was to pay the debt due to Brunel, and to secure him for his liabilities upon the said notes and Custom House bonds, and to enable him to pay off and discharge them. The amount of property, assigned was \$80,000 and the assignors were insolvent. The assignment on its face did not purport to convey all their property, but such was alledged to be the fact.

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The bill also charged, that at the time of the assignment Castro and Henriques were largely indebted to the United States upon other Custom House bonds, three of which were signed by the complainant Furman as surety, and which he paid to the United States on the 15th of December, 1824, after suit and judgment against him and Castro upon the bonds. The amount paid by him was \$3,737,52. The complainant Dias was a co-surety with Brunel on two of the bonds provided for in the assignment, on which judgments were obtained against him, Brunel and Castro, March 1, 1824, and Dias paid to the United States upon these judgments the sum of \$1,000, on the 7th of November, 1834.

The bill insisted, that by reason of the facts stated, the United States acquired a right of priority of payment out of the assigned property over all other creditors under the act of Congress hereafter referred to, and that the complainants in consequence of having been compelled as sureties, to make the payments above mentioned, were entitled, in respect to the sums so paid, to stand in the place of the United States, and be preferred in the same manner. But the bill admitted that the right so claimed was to be shared in common with the United States, which still held unpaid bonds of Castro, given for duties as aforesaid, to the amount of about \$10,000, on the most of which one Thouillier was the surety.

The bill further charged, that the property assigned to Brunel was sufficient not only to pay all the debts provided for in the assignment, but all the Custom House bonds of Castro, and a large dividend on the other debts of Castro and Henriques, but that Brunel, in disregard of the rights of the United States, and of the duty he owed to the sureties of Castro in the bonds, paid the simple contract debts mentioned in the assignment, being \$6,873, and thereby made himself personally answerable for that amount. That Brunel died 29th July, 1833, having made his will whereby the defendant Bouchaud was appointed his executor, and that Bouchaud as such executor took possession of a large amount of the property of his testator, including the effects assigned to him by

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Castro and Henriques which had not been applied to the payment of their debts; also, that the said executor paid sundry simple contract creditors of Brunel, without regard to the preference due to the United States, and mingled the trust fund with the individual property of Brunel; and the bill insisted that Bouchaud was personally liable, to the extent of the assets received by him, for the debts of Castro and Henriques which Brunel in his lifetime had fraudulently failed to discharge.

Bouchaud, Castro and Henriques, and the United States, were made defendants to the bill and the prayer was, that the complainants might be paid the amounts which they had respectively paid as sureties upon the bonds, and interest, from the estate of Brunel if that should be sufficient, and if not then that Bouchaud might be personally charged.

It was claimed on the part of the complainants, that the right of the United States to priority of payment of the Custom House bonds, arose under the act of Congress, passed March 2, 1799, § 65, (1 *Story's Ed. Laws U. S.* 630) which enacts, "that in all cases of insolvency, or where any estate in the hands of executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States on any such bond or bonds shall be first paid, and any executor, administrator, or assignee, or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts so due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person or estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts in the proper Court having cognizance thereof." A subsequent clause in the same section declares, "The cases of insolvency mentioned in this section, shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors,

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or in which the estate and effects of an absconding, concealed or absent debtor, shall have been attached by process of law, as to cases in which an act of legal bankruptcy shall have been committed.

The defendant, Bouchaud, put in a demurrer to the bill for want of equity, which was overruled by the Vice Chancellor, whose decision was affirmed by the Chancellor on appeal. Bouchaud appeals to this Court.

E. Sandford, for Appellant.

J. L. Mason, for Respondents.

B. F. Butler, for the United States.

BRONSON, J. The Act of Congress, (1799, *Chap.* 128, § 65.) so far as it touches the present question, only gives a priority to the United States in cases of insolvency, where a "debtor, not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof, for the benefit of his or her creditors." This provision never has been, and I think never should be, carried beyond cases where the debtor has made an assignment for the benefit of his creditors in general. Here the assignment was made for the benefit of Brunel; and for no one else. No debts were to be paid, except such as were due to him, and those for which he had made himself liable, either as endorser or surety, for the assignors. It is true that paying the debts for which Brunel stood as endorser or surety would in effect satisfy the creditors to whom those debts belonged. But that was only an incidental effect of an assignment which was made for the benefit of Brunel alone. No fair and reasonable construction of the act of Congress will give the government a preference when the debtor has only assigned his property for the purpose of paying or indemnifying a single creditor or surety. This question was considered, and the authorities were examined in the *U. S. vs. McLellan*, (3 *Sumner* 345) and although this case may be distinguished from that, the reasoning of Mr.

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Justice Story goes the whole length of deciding that this bill cannot be maintained, and I am fully of that opinion.

The assignment states very distinctly the object for which it was made ; and there is nothing in the case to impeach the statement.

The decree of the Court of Chancery should be reversed ; and a decree should be entered allowing the demurrer and dismissing the complainants' bill, with costs in the Court of Chancery. Costs on the appeal are in the discretion of the Court ; (2 *R. S.* 618, § 25) and where a decree is reversed, I think no costs should be given. That was the rule of the late Court of Errors for a long time, and until within a very recent period.

Such are my views of the case, and such is the judgment of the Court.

Decree accordingly.

JEWETT, CH. J., dissented.

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1	206
116	239
116	241
1	206
160	289

**JOHN T. STAGG, Executor, &c., Appellant, vs. JAMES JACKSON
and MARY E., his wife, Respondents.**

Where a testator devised and bequeathed all his real and personal estate to his executors, in trust, to sell the same whenever they should see fit; also with authority to lease the same, and directed the executors to divide the whole trust estate into nine equal parts, and pay over and convey one of said parts to each of his four children who were of age, and to hold the remaining five parts until his minor children should respectively become of age, and to pay over and convey to them their shares as they should become of age; *held*, that the executor could be compelled to account before the Surrogate, not only for the personal estate bequeathed to him, but also for the rents and profits of the real estate, and for the proceeds of such real estate as he had sold pursuant to the directions contained in the will.

It seems, upon the doctrine of equitable conversion, that under such a will the whole estate is to be considered as personal estate from the death of the testator, so that the rents and profits of the real estate received by the executor, and the proceeds of a sale thereof made by him, become legal assets in his hands, for which he is bound to account as personal estate.

Appeal from Chancery. Abraham Stagg died in 1835, having first made his last will and testament whereby he devised and bequeathed to his executors all his estate, real and personal, in trust, to sell such estate, or any part of it, whenever they should see fit, with authority also to lease the same for a life or lives or for years, and to invest the monies arising from the sale or the leasing, in bonds and mortgages, or in stocks, and to change the investment as often as they should see fit. The will also directed the trustees to divide the trust estate, and the proceeds and income thereof, into nine parts for his children, and to pay over and convey one part to each of his children, Anna Matilda, Mary Elizabeth, and John T.; to hold one other part as the share of Hannah Augusta upon certain specified trusts; and to hold the remaining five parts until the testator's five minor children should respectively become of age, and then to pay over and convey to them respectively their shares. During their minority the trustees were directed to pay out, from the income of the share of each child, such sum for the education and support of such

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child, as they should think proper. In case either of the minors should die under age without leaving lawful issue, then the share of the one so dying was to be divided among the surviving children, and the children of such as should be dead, the child or children of a deceased child, taking the part which the parent if living would be entitled to.

The appellant, John T. Stagg, who was appointed by the will one of the executors and trustees, proved the will and took out letters testamentary. The respondents are one of the daughters of the testator and her husband.

The appellant was cited before the Surrogate of the city and county of New York, on the petition of the respondents, to render his account as executor, and such proceedings were had that in August, 1843, he filed his account, omitting therein all mention of the rents and profits of the testator's real estate, and the proceeds of the sale of such real estate which had come to his hands. The respondents took exceptions to his account, alleging, among other things, that certain real estate had been sold pursuant to the directions contained in the will, and insisting that the executor should charge himself with the proceeds of such sale, and with the rents and profits of the real estate received by him. The executor demurred, insisting, that the Surrogate's Court had not jurisdiction to compel an account of the funds arising out of the real estate, and that the settlement thereof could not be legally had in that Court. The Surrogate made an order overruling the demurrer of the executor, and directing him, among other things, to account for the rents and profits and the proceeds of the sale of the real estate. From this part of the order the executor appealed to the Chancellor, who affirmed the decision of the Surrogate, and further directed the executor to pay certain interest, by way of damages, for the delay and vexation caused by the appeal. The executor appeals to this Court.

H. E. Davis, for appellant.

L. B. Woodruff, for respondents.

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Points for Appellant :

I. The Surrogate's Court, by its original constitution had no concern with or jurisdiction over real estate, and whatever jurisdiction it at present possesses over real property is derived exclusively from statutory enactments. (*Dakin vs. Hudson*, 6 Cow. 221; *Bloom vs. Burdick*, 1 Hill 139.)

II. If the Surrogate has any jurisdiction in this case, it is derived from the statute which enacts that "where, by any last will a sale of real estate shall be *ordered* to be made, either for the payment of debts or legacies, the Surrogate, in whose office the will shall be proved, shall have power to cite the executors in such will named to account for the proceeds of the sales, and to compel distributions thereof, and to make all necessary orders and decrees thereon, with the like power of enforcing them, as if the said proceeds had originally been personal property of the deceased in the hands of an administrator. (2 R. S. 110, § 57).

III. The will of Abraham Stagg devises the real estate to his executors to sell all or any part of the trust estate *when-ever they shall see fit*—thus leaving the sale to rest entirely in the discretion of the executors. The case therefore does not come within the statute above cited, and the whole will shows a case of trust, in which the trustee is accountable only in a Court of Equity.

IV. The trustees may in their discretion lease the real estate, and in that case the rents and profits are to be paid over to certain persons. This is a clear devise and not a legacy, and if a devise the Surrogate has no jurisdiction over it.

Points for Respondents :

I. By the provisions of his will the entire property of the testator, real and personal, was blended in one common fund; real estate to be converted into money, and the whole, together with the income thereof, to be applied to the payment of debts and legacies, and to be divided among his children.

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1. This amounted to a conversion of the real estate into personalty *at the death of the testator*, upon the doctrine of equitable conversion.
2. This would be true, even if there had been no devise of the legal estate, but only a power to sell, &c. to pay debts and legacies, &c. (*Ram on Assets*, p. 139, (205,) and cases cited; 2 *Pow. on Dev.* p. 60, and onward; *Leigh & Dalzell on Eq. Conversion*, 5 *Law Library*, 1st Series; *Marsh vs. Wheeler*, 2 *Ewd. Ch. R.* 157; *Lorrillard vs. Coster*, 6 *Paige*, 218; *Bunce vs. Vandergrift*, 8 *Paige*, 87).

II. In accordance with the above principles, which apply in equity to the whole estate *before* it is actually converted into money, the rents and profits, *when collected*, and the *proceeds* of sales actually made, are legal assets in the hands of the executor.

1. The powers conferred by the will appertain to John T. Stagg, in his representative character (i. e. as executor).
2. And upon the principle that whatever goes to the executor *as executor* is legal assets, both the income before a sale and the proceeds after the sale are deemed legal assets in his hands. (1 *Cruise*, 61; 1 *Atk.* 484; 1 *P. Wms.* 430; *Hard.* 404. 133; 1 *Vern.* 63; 2 *Vern.* 106, 248, 405; *Prec. Ch.* 117, 136; 2 *P. Wm.* 415, *Deg vs. Deg*; 1 *Lev.* 224 *Dethicke vs. Caravan*).

III. The interest of the respondents (in right of Mrs. Jackson, the daughter of the testator) is that of legatee, entitled to an immediate division of the estate. And the trusts created for the protection of the minor children and grandchildren of the testator do not impair the respondents' right to treat the moneys received by the executor as legal assets, received for their use.

IV. Real estate, when *converted* into money for the payment of debts and legacies and distribution, is not only legal and personal assets in the hands of the executor, but is to be accounted for before the Surrogate:

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1. The statute is explicit in regard to proceeds of sales.
2. There is no foundation for any distinction between the rents *collected* before the sale and the money received on the sale; both are the result of the conversion contemplated by the will.
3. The accounting must therefore be *as executor*. (2 R. S. 109-110, § 55, 57, 61; *id.* 92, § 52, 58; *id.* 90, § 45, 48; *id.* § 18, 19; *Bogert vs. Hertell*, 4 Hill, p. 492; *Toller on Exrs.* p. 413, and onward; *Sess. Laws of 1837*, Ch. 460, § 75, p. 537).

V. There is nothing meritorious in the objections by the executor to the order appealed from. The nature of these objections—the previous decision of the Court of Chancery upon the appellant's own application in regard to this estate, acquiesced in by him, and the lapse of *twelve* years, during which the executor has held this estate in his own hands, all show that this appeal is taken for the mere purpose of vexation and delay, while the executor retains the money for his private use and benefit. (2 R. S. 618, § 35, *Boyd vs. Brisbane*, 11 Wend. 529).

JEWETT, CH. J. The principal question made on the argument was, whether the Surrogate's Court had jurisdiction to compel an account and payment against the executor of the proceeds of the real estate sold by him under the power contained in the will of his testator and of the rents and profits of such real estate received by him before such sale under it.

In behalf of the appellant it was insisted, that that Court did not possess any jurisdiction over the subject, unless it was derived from 2 R. S. 110, § 57, which provides that "where by any last will, a sale of real estate shall be ordered to be made, either for the payment of debts or legacies, the Surrogate in whose office such will was proved, shall have power to cite the executors in such will named, to account for the proceeds of the sales, and to compel distribution thereof; and to make all necessary orders and decrees thereon, with the like power of enforcing them; as if the said proceeds had been

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originally personal property of the deceased in the hands of an administrator."

I am of opinion that, independent of that statute, and the provisions of § 75 of the statute of 1837, chap. 460, the Surrogate's Court had the jurisdiction claimed by it. By the provisions of 2 *R. S.* 92, § 52, the Surrogate has jurisdiction, upon application from some person having a demand against the *personal* estate of the deceased, either as creditor, *legatee* or next of kin, &c.; or without such application, to compel the executor or administrator to render an account of his proceedings; and by the provision of 2 *R. S.* p. 90, §§ 45, 48, p. 116, §§ 18, 19, he has jurisdiction to decree payment of debts, *legacies*, and distributive shares against the executor or administrator, in the following cases:

1. Upon the application of a creditor, the payment, &c., may be decreed at any time after six months shall have elapsed from the granting of the letters testamentary or of administration.

2. Upon the application of a legatee, &c., payment of such legacy, &c., may be decreed and enforced at any time after one year shall have elapsed from the granting such letters.

The testator by his will devised and bequeathed all his estate, real and personal, to his executors, their heirs, executors, administrators and assigns, as joint tenants and not as tenants in common, forever, in trust to sell the same, and until such sale, to receive the rents, profits and income thereof, for the purposes of his will, and upon the following trust: First, to invest the proceeds of the real and personal estate, and to pay out of the same \$50 annually, for the maintenance and education of his daughter Helena and his son Junius Theodore, respectively, until they should attain the age of fifteen years, over and above their respective distributive shares of the estate and the income thereof. Secondly, to divide the trust fund and the income thereof, subject to those charges thereon, into nine equal parts, and to pay over and convey one part thereof to his daughter Anna Matilda and her heirs, one equal part to his daughter Mary Elizabeth and her heirs,

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and one equal part to John T. the appellant, and his heirs; to hold one other part thereof in trust for his daughter Hannah Augusta Gautier, and to hold the remaining five parts thereof in equal shares for his other five children, Abraham, Benjamin Charles, Frederick, Helena, and Junius Theodore, who were then minors, as in the next clause of his will mentioned. Thirdly, to hold the shares of such minor children respectively, until they should arrive at full age, and then to pay over the same to them or their heirs or assigns; and during the minority of each, to pay so much of the income of his or her share, for his or her support and education, as the executors should think proper; and if either of said minor children should die under age and without leaving lawful issue, the will directed that his or her share should go to, and be divided among the surviving children of the testator and the issue of such of his children as should have died leaving children.

By these provisions it is manifest, that the testator intended that his whole estate, real and personal, together with the rents, profits, and income, intermediate the sale, should become united in one common money fund for the sole purpose of division and distribution among the objects of his bounty; and upon the principle of equitable conversion, the real estate was converted, by the devise and direction to sell, into personalty, from the death of the testator; the money arising from the sale thereof became legal assets in the hands of the executor when received by him, and for which, as such executor, he was bound to account as personal estate. The intent and direction of the testator to sell the land was absolute, or "out and out" for all purposes. The discretion of the executor in respect to the sale related merely to the time when, &c. (*Bcgert vs. Hertell*, 4 Hill 492; *Ram. on assets* 206; *Leigh vs. Dalsell, on Con. of Prop. chap. 1, 2, 8*; *Smith vs. Claxton*, 4 Mad. 484; *Marsh vs. Wheeler*, 2 Eden. Ch. R. 157; *Doughty vs. Bull*, 2 P. Wms. 320; *Deg vs. Deg*, *Ib.* 415, 1 *Jarmin on Wills*, chap. 19.)

Mary Elizabeth, one of the daughters of the testator, who

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is the wife of Jackson, is a legatee of one ninth of the whole estate, real and personal, including the rents, profits, and income thereof received by the appellant, subject to the payment of the debts and funeral charges of the testator and expenses of the administration, and the directions contained in the will. I agree with the Chancellor that the Surrogate was right in the sentence and decree which he made directing the appellant to account for the rents and profits and proceeds of the sales of the real estate as well as the personal effects of the testator.

2 *R. S.* 618, § 35, authorises the Court of Chancery, upon affirming any decree, upon appeal from a Surrogate's Court, to that Court, in its discretion to award damages to the respondent for the delay and vexation caused by such appeal. That discretion was exercised by the Court of Chancery on the affirmance of the decree of the Surrogate in this case, and upon correct principles as I think. I am therefore of opinion that the decree of the Court of Chancery should be affirmed, and, under the circumstances, with costs to be paid by the appellant personally.

Ordered accordingly.

 Brady v. McCosker.

BRADY, Appellant, vs. McCOSKER, Respondent.

A Court of Equity will not entertain jurisdiction to set aside a will of real estate for fraud, or on the ground of the testator's incompetency, where there is a perfect remedy at law, and the objection to the jurisdiction is taken in due season.

But where the party claiming in hostility to the will is not in possession, and an impediment exists which would prevent a recovery at law of the whole or any part of the estate devised, a bill in equity will be entertained to have the will declared void and delivered up to be cancelled.

Accordingly, where a bill was filed for the purpose of setting aside a will on the ground of fraud and undue influence, and it appeared that at the filing of the bill the complainant was not in the actual possession of the estate, and that a trust term in such estate, which vested the legal title in trustees, was yet unexpired, so that no recovery could be had in ejectment; *held*, that a demurrer to the bill for want of jurisdiction was properly overruled.

So also it is a good answer to an objection for want of jurisdiction, that a part of the estate devised is subject to an unexpired lease, under which the lessee or his assignee is in possession.

And where the bill distinctly shewed the existence of an unexpired trust term, and that a part of the estate was occupied by the assignee of an unexpired lease, and the other parts were occupied by persons under an agent, who had assumed the control and management of the property for the benefit of such party as should be entitled thereto, when the question upon the validity of the will should be settled; *held*, that an objection for want of jurisdiction would not lie, although the bill in another place alleged that the complainant was entitled to the whole estate by inheritance in fee simple, and that he "*held and was in lawful possession thereof*," this allegation being regarded as a formal legal conclusion from the facts specifically set forth in the other parts of the bill.

The complainant claimed half of the estate by inheritance from his father, and the other half by inheritance from his brother, and alleged that the will of his brother was void for fraud, &c.; but in case the will should be adjudged valid, then he still claimed one-half of the estate, and insisted that he was entitled to a partition; and the prayer of the bill was, that the will might be declared void, or that a partition might be had; *held*, that the bill did not make a case for partition, and therefore that it was not liable to objection for multifariousness.

Where a party, claiming an estate by inheritance, files a bill for the purpose of setting aside a will, and dies pending the suit, his devisee may file an original bill in the nature of a bill of revivor and supplement, and if his right as devisee be admitted or established, he will be entitled to the benefit of the proceedings in the original suit.

A person, who is charged with fraudulently procuring the execution of a will in favor of an infant, is a proper party to a bill filed for the purpose of setting aside such will, although he has no interest. He may be charged with the costs.

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Appeal from the decree of the Chancellor affirming that of the Vice Chancellor of the First Circuit. The case was this: John McCosker, the elder, died on the 26th of March, 1839, seized of certain real estate in the city of New York, leaving his sons, John and Thomas, his only children and heirs. By his will, (among other things) he directed his executors to take possession of his real and personal estate, and to receive the rents and profits of the real estate for the term of five years, and apply the same to the payment of his debts, also to pay to John an annuity of \$200, during the five years, and a like annuity to Thomas, and to pay the balance over to John at the expiration of the five years. He then devised the real estate, after the expiration of the five years, to John during his natural life, and the remainder to his issue in fee, and directed that John and his heirs, after the expiration of the five years, should continue the annuity to Thomas during his natural life. One of the executors named in the will died before the testator, and the other two declined to accept the trust. John died in 1843 without issue and unmarried.

In March, 1844, Thomas, the surviving son of the testator, filed his bill against his son, John Andrew McCosker, the complainant in this suit, and against Maria L. Brady, J. R. Brady, and J. T. Brady, the defendants in this suit, setting forth the above facts, and claiming that on the death of John, he (Thomas) was entitled to one-half of the said real estate as heir of his father, and to the other half as heir to his brother John. That bill also stated that soon after the death of John, the younger, the defendant, J. T. Brady, propounded to the Surrogate of New York, for proof, a paper purporting to be his will, whereby he gave one or two legacies and annuities, and all the rest and residue of his estate to the defendants, Maria L. and J. R. Brady. That bill also charged, that the execution of such will was fraudulently and improperly procured by the defendant, J. T. Brady, and that the same was null and void, so that the said John died intestate; that he (Thomas) opposed the proof of the will before the Surrogate, and the question of its validity was still pending in the Sur-

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rogate's Court; that the will was a cloud upon his title, and should be declared void by a decree of the Court of Chancery. It appeared also from that bill that in the absence of the complainant therein, and without his knowledge or consent, his friends had entered into an arrangement with J. T. Brady, who assumed to act for Maria L. and J. R. Brady, whereby R. Martin was to take the control and management of the property, and receive the rents and profits as agent for whoever might be entitled thereto; that the said real estate, which consisted of houses and lots, was in the hands of numerous occupants as tenants, and that one lot was yet under an unexpired lease given by John, the younger, in his life time, to C. Maas, whose assignee (Piper) was in possession under that lease.

That bill contained an allegation, that the complainant therein was entitled by inheritance as aforesaid, to all of the said real estate in fee simple, and he "*then held and was in lawful possession thereof.*" In case the will of John, the younger, should be held valid, that bill insisted that he (Thomas) was still seized of an undivided half of the said real estate by descent from his father, and that he was therefore entitled to a *partition* of the same. The prayer of the bill was, that the will of John McCosker, the younger, might be declared void; or in case it should be held valid, that a partition might be made, and for general relief.

The several defendants in that bill appeared thereto. John Andrew McCosker and Maria L. Brady, being infants, put in general answers by their respective guardians. J. R. Brady also answered the bill, and J. T. Brady demurred. A replication to the answer of J. R. Brady was filed, and then Thomas McCosker, the complainant in that suit, died.

In October, 1844, John Andrew McCosker filed the bill in this cause by his next friend, in which he set forth the filing of the said bill by his father Thomas, the allegations therein contained, the proceedings in that suit, and the death of his father, averring also that the matters stated in the said bill of Thomas were true. The bill in this suit further states, that

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the said Thomas McCosker devised all his real estate to the present complainant, including the lands in question; that the former suit had abated by the death of Thomas, and it insists that the present complainant is entitled to the benefit and advantage of the said original suit, and it prays the relief claimed in that bill. The defendants, J. T. Brady and J. R. Brady, put in separate demurrers to the bill, assigning several special causes of demurrer. Their demurrers were overruled by the Vice Chancellor, and on appeal his decision was affirmed by the Chancellor. J. T. Brady appeals to this Court.

E Sanford, for appellant.

Charles O'Connor, for respondent.

GARDINER, J. It is the established doctrine of a Court of Equity, that it will not assume jurisdiction to set aside a will for fraud, or on the ground of the testator's incompetency, where there is a perfect remedy at law, and where the objection to the jurisdiction is taken in proper season. (2 *Paige* 399; 3 *Br. P. C.* 858; 7 *Price* 668; *Jacob R.* 466; 1 *Mad. Ch.* 85.)

As the jurisdiction of the Court of Chancery, according to the rule above mentioned, depends upon the inadequacy of the legal remedy, the bill must state the impediment to relief in a Court of law. (*Pemberton vs. Pemberton*, 18 *Ves.*; *Jones vs. Jones*, 3 *Meriv.* 166 and note.) If the impediment relates only to a part of the real estate embraced in the will, it would seem to be sufficient to confer jurisdiction. As to the part thus incumbered, the complainant would have an undoubted right to the aid of a Court of Equity, (*Story's Eq. Jurisdic.* § 83,) and the jurisdiction thus acquired would upon general principles be retained, in order to prevent a multiplicity of suits, and to afford complete relief to the parties. (2 *John. Cas.* 424; 10 *J. R.* 587; 17 *do.* 884; 1 *Wheaton* 197.)

In the second place, the form of the negative plea to the jurisdiction of the Court, and of the order for an injunction

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in those cases where an issue of *devisavit vel non* is proper to be awarded, leads to the same conclusion.

The allegation of the plea is general, that the obstruction to the legal remedy charged in the bill, applies to "none of the real estates which are subjects of controversy. (*Armitage vs. Wadsworth*, 1 *Mad.* 111.) And the usual order for injunction, restrains the defendant from setting up any lease, outstanding term, &c., to defeat the plaintiff's claim, in any issue or action directed by the Court for the recovery of *any* of the real estate, or the rents and profits thereof. (3 *Merivale* 172.)

The complainant alleges that at the time of filing the original bill by Thomas McCosker, the whole premises were subject to the unexpired trust term created by the will of John McCosker, the elder, and part of them to an unexpired lease executed by John McCosker, the younger, on the 28th of February, 1842, to Carston Maas, for three years from the first day of May following, which lease had been duly assigned to Julius Piper, one of the defendants. The trust established by the will of John McCosker, the elder, for the payment of an annuity of \$200 to Thomas McCosker during his natural life, was a valid trust under the third subdivision of the 55th section R. S., 1 vol., page 729. The language of which is, that "express trusts may be created to receive the rents and profits of lands, and apply them to the use of any person, during the life of such person, or for any shorter term." By the 60th section, the whole estate in law and equity is vested in the trustees. If the trust was invalid, then the lease passed the interest of John McCosker, the younger, to Carston Maas, who was in actual possession at the filing of the bill, paying rent according to said demise to Robert Martin, as agent for the parties who might be entitled to the same. These facts are distinctly alleged in the bill, and admitted by the demurrer, and *prima facie* they present an insuperable obstacle to a recovery at law. If the trust was within the statute, ejectment would not lie for any part of the premises; if it was not, then it could not be maintained against the as-

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signee of Maas by the complainant, who claims as to all the interest in controversy, through John McCosker, the lessor. No suit could be sustained against Martin because he received the rents as a receiver, constituted with the assent of both parties, for whoever might ultimately be entitled to it. He was a mere stake-holder, and if sued, could compel the parties to interplead and settle the right by the decree of a competent tribunal.

Assuming that the impediments to the legal remedy were such as to entitle Thomas McCosker to relief in equity, when he filed the original bill, it cannot be seriously questioned that the complainant succeeded to his rights in this respect, and is entitled to continue the suit, if it was properly commenced. (*Barbour, Ch. P. 82.*)

The complainant claims as devisee through his father. Not succeeding to the rights of the decedent by mere operation of law, he could not file a bill of revivor, but could only have the benefit of the original proceedings, and avail himself of the new facts necessary to be stated by an original bill, in the nature of a bill of revivor and supplement. (*Welford, Ch. Pr. 220, 222; Barbour Ch. Pr. 64 and 82.*)

This has been done, but it is alleged that the complainant being a defendant in the original suit, could not revive it until after a decree giving him an interest in its continuance. (1 *Barbour* 41.)

This would be true if the complainant sought to revive as a defendant, or as the representative of a defendant. But he has succeeded to the right of his father the plaintiff in the original suit, and claims the benefit of that suit by virtue of such succession. This distinction is sufficiently obvious, and is recognised in *Soullard vs. Dias*, 9 Paige 894, to which we have been referred by the counsel of the defendant.

The main question is whether the present and former complainants, have not precluded themselves by their own allegations from any relief whatever in Chancery. Thomas McCosker by the original bill, "claimed to be and charged that he was (*Fol. 72*) entitled by inheritance as *aforesaid*, to

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all the lands, tenements, and hereditaments, and every part and parcel thereof, in fee simple, and that he then held and was in lawful possession thereof." I thought upon the argument that this statement was an insuperable obstacle to any relief in Chancery, unless indeed the aid of that Court could be invoked in order to remove a cloud from the title of the complainant. But upon a more particular examination of the bill, I am satisfied that my first impressions were erroneous. The bill alleges that the premises in question consisted of two lots of land, with several dwelling houses thereon, in which before, and at the time of the death of John McCosker the younger, and *at all times since*, there were, and at the *time of filing the said* original bill still were, numerous occupants in humble condition, &c., from whom little or nothing could be obtained, unless some one with the right and powers of a *landlord*, and standing *in that relation* should collect the rents, &c.; *that* Julius Piper was in possession of the property devised to Maas at the filing of the bill, paying rent to Martin, &c. It is further stated, that in consideration of the importance of securing some *immediate control* over said property, in order to prevent waste, and secure the collection of rents, some friends of the complainant without his knowledge or consent, united with J. T. Brady, acting in behalf of those claiming under the will of John McCosker the younger, in a request to Martin to assume the control of the property and receive the rents as agent for *whoever might be entitled* to them, that Martin did so, that the uncertain nature of his power, produced great embarrassment. It is further alleged that the complainant Thomas McCosker was destitute of any means, or property, except what he might be *entitled* to from the estates of his father and brother. That no *part* of his annuity had *been paid* to him since his brother's death, although he had received an *equal sum* from Martin. The bill then denies that the defendants are in the receipt of the rents and profits of said premises or any part thereof (*Fol. 71*) or are in the occupation thereof; but that the same are in the occupation of *persons residing* thereon. Now these allega-

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tions are utterly inconsistent with the statement that the complainant "then held and was in the lawful possession of said premises," if by that we are to understand any thing more than a legal seizure. The bill informs us that the whole legal and equitable estate was vested in trustees, or in the Court of Chancery, that the assignee of Maas was in possession of the house demised to him, and who were the actual occupants of other parts of the real estate; the person that was actually in the receipt of the rents and profits, and the nature of his authority, which was to receive them as agent for whoever might be entitled to them. The effect of the averment under consideration, read in connection with what has been quoted from other parts of the bill, is only that the complainant Thomas McCosker was then *entitled* by inheritance as *aforesaid*, to all the lands, tenements, and hereditaments, in fee simple, and that he *therefore* held and was in lawful possession thereof. In other words it is a formal legal conclusion from the facts previously stated.

It is also objected that the bill is multifarious. Multifariousness, as the term is generally understood, applies to bills in which there is a misjoinder of distinct and independent causes of action. Or secondly, where the party has no interest in the subject in litigation; and lastly, where one or a part of the defendants, is able to say that he is brought as a party upon a record, with a large portion of which, and the case made thereby, he has no connection whatever. (1st *Mylné & Craig*, 608.)

The two first propositions refer to cases of misjoinder. The last to multifariousness, strictly so called. (*Mylné vs. Craig*, 603, *Jac. R.* 141; *Harrison vs. Hogg*, 2 *Vesey* 328, *Story's Eq.* § 271, 279, 280.)

There is no misjoinder of actions in this case; for the bill is not properly framed for partition. The plaintiff alleges, that he is entitled to all the real estate by inheritance from his father, and John McCosker the younger, and that the will through which alone the defendants claim title to any part of the property is null and void.

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Partition implies an interest in different persons in the property to be divided. When a complainant not only claims the whole, but negatives the title of the defendant to any part, the bill may be defective, but is certainly not obnoxious to the objection, that a case for partition as a *distinct and independent cause* of action is thereby established. Whatever therefore may have been the intention of the pleader, the bill must be treated as single. (*Story Eq. § 288, 1 Sim. and Stuart 61.*)

There is no misjoinder of parties. James T. Brady was a proper party to the bill, for the reason suggested by the Chancellor. In *Boule vs. Stewart*, 1 Schoale and Lefroy 227, a Solicitor was made a party for assisting his client in obtaining a release. He had no interest in the matters in controversy. It was insisted, that he acted merely in his capacity as Solicitor. Lord Redesdale said he was properly made a party, and ought to be chargeable with costs so far as they related to the release, in case they could not be recovered of his client. (*Story Eq. § 282.*)

Assuming the truth of the facts charged in the bill, as we must for the purpose of this decision, the infant defendant Maria L. Brady ought not to be charged with costs in any event. She had no agency in procuring the Will, and is incapable of ratifying or confirming the acts of others.

The demurrer of the defendant Brady, is to the whole bill, and can only be sustained by establishing a misjoinder of actions, or parties, to which species of multifariousness it is alone adapted. (*Story Eq. Pl § 284, 1 Mylne and Craig, 608; 2 Anstr. 469.*)

If the bill is defective in praying for a partition, or contains irrelevant matter unconnected with the case properly presented, the demurrer should be confined to the parts really objectionable and not extended to the whole bill. It was therefore properly overruled by the Chancellor, and the decree should be affirmed.

RUGGLES, JONES, JOHNSON and WRIGHT, Js., concurred.

Cornes v Harris.

BRONSON, J. and GRAY, J., delivered opinions in favor of reversing the decree, with whom JEWETT, C. J., concurred.
Decree affirmed.

CORNES vs. HARRIS.

In the Common Law action by writ of nuisance, as retained and regulated by the Revised Statutes, it seems that the declaration must shew that the plaintiff has a freehold estate in the premises affected by the nuisance. This is a real action. But in an *action on the case* for damages merely, sustained in consequence of the erection of a nuisance, it is enough that the plaintiff is in possession of the premises affected thereby.

The form of an action is determined by the matter set forth in the declaration, and not by the name which the plaintiff may give it. If, therefore, the pleader, in the commencement of a declaration, gives the action a wrong name, it will do no harm.

The plaintiff commenced his action by writ of nuisance pursuant to the statute. (2 R. S. 332.) The formal commencement of the declaration was appropriate to that action and referred to the writ; but the declaration contained no averment that the plaintiff had a freehold estate in the premises affected by the nuisance. It shewed, however, a good cause of action on the case, and concluded thus, "to the nuisance of said dwelling house and premises of the plaintiff and to his damage of five thousand dollars"; *held*, that it was a good declaration in an action on the case, although it shewed no ground of recovery in the action of nuisance proper; and therefore, that the Supreme Court was right in denying a motion made after verdict in arrest of the judgment.

Harris commenced an action against Cornes in the Supreme Court by writ of nuisance in the form prescribed by 2 R. S. 332, § 8. The declaration afterwards put in commenced thus: "Oneida County, ss. George Cornes was summoned by writ according to the form of the statute in such case provided, to answer Oliver Harris in a plea of nuisance, wherefore he hath raised a certain slaughter house, and divers cattle pens, hog pens, &c.; and thereupon the said Oliver Harris by, &c., complains of the said George Cornes: For that," &c. The declaration then went on to state that the plaintiff was *possessed* of a certain dwelling house and premises at Sangersfield, Onei-

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da county, which he inhabited with his family; that the defendant was also possessed of certain premises contiguous to those of the plaintiff, and contriving, &c., on &c., and on divers other days erected on his premises a slaughter house, and cattle pens, hog pens, &c., and kept therein and slaughtered large numbers of cattle, hogs, &c., thereby causing noxious and offensive smells, and loud and offensive noises, and tainting and corrupting the atmosphere, so as to render the dwelling house and premises of the plaintiff unfit for habitation. There was no averment in either of the counts that the plaintiff *was seized in fee of the premises occupied by him, or that he had a freehold estate therein.* The conclusion was in these words: "to the nuisance of the said dwelling house and premises of the said plaintiff, and to his damage of five thousand dollars, and therefore he brings suit, &c."

The defendant pleaded not guilty, and on trial at the Circuit a verdict was had for the plaintiff for two hundred and fifty dollars damages. The defendant moved in the Supreme Court to arrest the judgment, which motion was denied and judgment rendered for the plaintiff for the above sum as damages, and the costs of suit. There was no judgment that the nuisance be removed. The defendant removed the record to this court by writ of error, and upon an allegation of diminution in the record and writ of *certiorari*, caused the writ of nuisance by which the suit was commenced, and the rule of the Supreme Court denying the motion in arrest to be certified to this court.

W. Tracy, for plaintiff in error insisted: (1.) The action is the Common Law assize of nuisance as modified by the provisions of the Revised Statutes, but not modified by any other statute, or rules of pleading or practice. (2.) The writ of nuisance could only be maintained by the owner of the freehold affected by the nuisance, and the Revised Statutes have made no change in the action in this respect. (3*Bl. Comm.* 220, 221, 222; 1 *Com. Dig. Assize, B. 4 B. 5*; 1 *Rolle* 271.) (3.) The declaration is bad therefore in substance, for not averring that the plaintiff owned the premises affected by the

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nuisance as his freehold, and that the defendant erected the nuisance to its injury; and the defect is not cured by the verdict. (2 *Cowper* 825; *Graham Pr. 2d Ed.* 657 and the cases there cited; 1 *Term. Rep.* 470; 5 *Barn & Adol* 27; 1 *Johns.* 380; 10 *Do.* 369.) (4.) Each of the counts in the declaration being defective in substance, and showing no title to recover, the Supreme Court erred in denying the motion, in arrest. (*Graham Pr.* 641, and the cases there cited.) (5.) Our conclusion cannot be avoided by calling the action any thing else than a writ of nuisance. It is that or nothing. It is commenced by the writ provided by the statute. The declaration recites the original as a declaration in that action should, and it concludes as well as commences in nuisance. The difficulty is that if the declaration be true in every particular it does not authorize a recovery in that action. It is not an action *on the case* for a nuisance, which could only be commenced by *capias* or by declaration. It is a *real action*, as such known to the Common Law and expressly retained by the Revised Statutes, and being so regarded, the fatal defect is, that the plaintiff in his declaration shows no interest in the premises, which authorizes him to maintain it. (6.) The plea of the defendant taking issue upon the declaration did not cure its defects. If the declaration be bad in substance, the plea cannot make it good.

C. P. Kirkland, for defendant in error insisted: (1.) The declaration in this cause is *in case* for nuisance, a mere *personal action*. (2 *Chit. pl.* 769 to 776, *Phil. Ed.* 1828.) (2.) It can not be in the *real action* of nuisance, as it omits the distinguishing and vital feature of that action, viz: the averment of freehold or seizin in fee in plaintiff and defendant. (*Rast. Ent.* 441; *Yates Pl.* 520, 521; 2 *R. S.* 257, § 3; 3 *Christ Bl.* 220; 16 *Vin. Ab.* 22, *Nuisance D*; *Fitz: N. B.* 183, 4, 5; 2 *Saund Pl. and Ev.* 229, (686;) 1 *Com. Dig.* 306, (*D.* 1;) 3 *Ch. Bl.* 222; 16 *Vin.* 33, *Nuisance*, (*K.* 2;) 2 *R. S.* 256, 7, § 7). (3.) The plea is the proper plea in the *personal* action, not in the *real*. (*Jacks. Tr. Real Prop.: app.* 360 362.) (4.) The statement in the prefatory part of the decla-

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ration, as to the manner in which the defendant below was brought into court, is perfectly immaterial. It may have been good ground of *special demurrer*, but nothing more. (5.) The only mode of taking advantage of a variance between the writ and declaration, as not being in the same action, was by motion to set aside the declaration for irregularity. (1 *Wend* 305; 4 *J. R.* 484; 12 *Wend.* 271.) (6.) It is not pretended that in this action, as stated in the declaration, the plaintiff is or possibly could be entitled to the judgment of removal given by the statute in the real action of nuisance. No such judgment has been asked for or rendered: but the plaintiff was entitled to his judgment on the verdict for his damages with costs as in any other personal action: and this is the judgment and the only judgment that has been rendered. (7.) The plaintiff in error neither has nor pretends to any *merits*—his ground is purely and merely *technical*; and he could have availed himself of it only as a *matter of practice* by motion to set aside the declaration for a technical variance. (2 *R. S.* 344, *S.* 7, *sub.* 4, (2d ed.)

BRONSON, J.—If this is the old assise of nuisance, there is no doubt but that the declaration is insufficient and the judgment erroneous. But if it is an action on the case, it is equally clear that the declaration is sufficient and the judgment right. On the motion in arrest of judgment the Supreme Court held, and we think very properly, that it was an action on the case. The defendant insists that it is a writ of nuisance because the plaintiff has given the action that name in the commencement of the declaration; and because a writ of nuisance seems to have been issued to bring the defendant into court.

It is not necessary to mention the form of the action in the commencement of the declaration; and if the pleader gives it a wrong name it will do no harm. The form of the action is determined by the matter set forth in the declaration, and not by the name which the plaintiff may give it. (*Seneca Road Comp. vs. Auburn R. R. Comp.* 5 *Hill* 177; *Ander-*

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son vs. *Thomas*, 9 *Bing.* 678; *Lord vs. Houston*, 11 *East* 62; 2 *Chit. Pl.* 12 note (e.) *Ed. of '87 Grah. Prac.* 202.) Disregarding, as we must, the misnomer, this is a very good declaration in an action on the case.

Now as to the writ. It is not a matter of any importance how the defendant came into court—whether he was served with a writ, *capias*, or declaration; or whether he appeared voluntarily without process of any kind. It is enough that he appeared and pleaded to the declaration in an action of which the court had jurisdiction. He cannot afterwards object, not even by motion, that he was not regularly brought into court, or that the declaration varies from the process. The principle is a familiar one. If the defendant had moved, before pleading, to set aside the declaration for variance from the original, the motion would probably have been denied. (*McFarland vs. Townsend*, 17 *Wend.* 440.) And clearly the Supreme Court had nothing to do after verdict, when the motion in arrest was made, with the manner in which the defendant was brought into court, or with any supposed variance between the writ and the declaration.

We are all of opinion that the judgment should be affirmed.

Judgment affirmed.

Gracie v. Freeland.

GRACIE, Appellant, vs. FREELAND and others Respondents.

An appeal will not lie to the Court of Appeals from a decision made in the Supreme Court by one Justice at a special term.

A party complaining of any order made at a special term, has a *right* to have the matter re-heard and passed upon by the Supreme Court, at a general term.

The appellant, Gracie, who was complainant in the Supreme Court, appealed to this Court from an order in an equity cause, made by one of the Justices of the Supreme Court while holding a special term. No re-hearing of the matter had been had or applied for at a general term of the Supreme Court.

A. L. Jordan, Attorney General, for the respondents, moved to dismiss the appeal on the ground, among others, that an appeal to this Court would only lie from a decree or order made by the Supreme Court at a general term.

R. W. Peckham, for the appellant.

BRONSON, J. This is an appeal from an order in an equity cause, made by one of the Justices of the Supreme Court while holding a special term; and there has been no re-hearing and order upon the matter by the Supreme Court in general term. A motion is made to dismiss the appeal, on the ground that an appeal will only lie from the decrees and orders of the Supreme Court, in equity causes, made at the general term.

It is difficult to suppose that the Legislature, if it has the constitutional power to do so, has provided that all equity causes shall be first heard at a special term before a single Judge; and has then given an appeal to this Court, before the matter has been heard and determined by the Supreme Court in general term, where there must be three Judges. It is not to be presumed that the Legislature intended the parties should go to the Court of last resort, before they had obtained the judgment of the full bench in the Court where the

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proceedings were instituted. We ought to find unequivocal words to that effect, before we give such a construction to the statute. But so far from finding such words, I think the Legislature evidently intended there should be a re-hearing at the general term, before there could be an appeal to this Court.

The judiciary act authorizes appeals to this Court from the orders and decrees of the Supreme Court "organized by this act," without expressly specifying either branch of that Court. (*Stat.* 1847, p. 321, §§ 10, 11.) But the 20th section prescribes the manner in which the causes shall be disposed of in the Supreme Court, which is as follows: "All suits and proceedings in equity, in said Supreme Court, shall be *first* heard and determined at a *special term* of said Court, unless the Justice, holding such special term, shall direct the same to be heard at a general term;" and when "heard and determined at a special term, either party may apply at a *general term* for a re-hearing." It will be seen that two things are here mentioned; first, a hearing and determination at a special term, and then an application for a re-hearing at a general term. Both of these things must be done before the Supreme Court has got through with the cause, and put it in a condition to be carried to an Appellate Court. If this be not so; if the cause may go by appeal from the special term directly to the Court of Appeals, then there may be an application to the Supreme Court, at general term, for a re-hearing, after the cause has gone to the Court of Appeals; and, indeed, after that Court has heard and decided the case. No one can suppose that such was the intention of the Legislature.

Although the statute only says, the party "may apply at a general term for a re-hearing," I think he has the right to have his cause heard and decided there; and that he cannot be turned away by simply denying the motion, nor by ordering a re-hearing at the special term.

The application for a re-hearing for which the statute provides, is not precisely the same thing in the attending circumstances as a motion for a re-hearing in Chancery. In that

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Court, the motion is almost invariably addressed to the same officer who made the decree, and who is consequently prepared to decide at once, and without any extended discussion or examination upon the propriety of granting the application. But under the present judiciary system, the motion is not to be heard at the special term, where the decree was made, but at the general term, where a majority, at the least, of the Judges, will be strangers to the cause, and consequently cannot be prepared to make a proper disposition of the motion, without hearing and examining the matter about as fully as they would for the purpose of making a decree. From this consideration it may be inferred, that the re-hearing for which the statute provides, is a hearing of the cause by the full bench, at the general term. If the Legislature had contemplated a re-hearing at the special term, they would have directed the application to be made there; or rather, they would have said nothing about it. The officer who has power to hear and determine equity causes, has power to grant a re-hearing. It is a part of the general common law jurisdiction of a Court of Equity, which need not be conferred by statute. And besides, it is almost absurd to suppose that the Legislature intended the cause should be heard by three Judges, for the purpose of enabling them to decide whether it should be referred back to one of their number, or to some other single Judge, for a re-hearing. If sent back to the special term on the ground that the decree was erroneous, the special term Judge might be of a different opinion; and then the original decree would stand, although a majority of the Judges deemed it erroneous. If it be said that the special term Judge should follow the opinion of the full bench, then clearly it would be but an idle ceremony to send the cause back to the special term. The full bench should enter the proper decree at once, instead of sending the cause away, to have its judgment registered in another place, with the loss of both time and expense.

The statute does not command the Court to hear the application. But I need not cite authorities to prove, that when

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an individual has the right to apply to a Court for anything in the course of the administration of justice, it is the duty of the Court to hear and decide. It is said, however, that the applicant must make out a case before the Court is bound to hear him; and that is very true. But what kind of a case? He must shew himself a party to a decree or order made at a special term. The statute requires nothing more; and when such a case is presented, it is the duty of the Court to hear and decide. And as the full bench cannot be prepared to determine the motion which it is required to hear, without something like a full discussion and examination of the whole matter, I think that bench should decide the cause. It should do so, either by ordering a re-hearing as a matter of course, and then hearing the cause; or by hearing the matter at large in the first instance. The case should not be disposed of by simply denying the motion, nor by sending the cause back to the special term for a re-hearing; but it should be decided, by making what the full bench may deem the proper decree or order in the premises. When the statute is read with reference to the nature of the case for which it provides, I cannot entertain a doubt on the subject. I think the Legislature intended that every party who should be dissatisfied with a decision made at the special term, should be entitled to have his case heard and determined by the full bench.

If the party has the right to a hearing at the general term, then of course he should go there from the special term, instead of taking an appeal. The Legislature could not have intended that there should be an appeal to this Court before the matter had been finally disposed of in the Court of original jurisdiction. The appeal must be from the decision at the general term.

The amendatory act passed by the same Legislature, (*Stat.* 1847, p. 641, §§ 21, 22, 23.) goes to confirm the construction which I have given to the original statute.

I am of opinion that the appeal should be dismissed.

GARDINER, J. The constitution has provided a Supreme

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Court, having general jurisdiction in law and equity, with eight branches, one in each judicial district. (*Art. 6, Sections 3, 4, 16.*) The fourth section of article 6, declares, that there shall be four Justices of the Supreme Court in each district. The sixth section, that the general terms of said Court for each district, may be holden by any *three* or more of said Justices, of whom a presiding Judge to be designated by law shall be one. And that special terms and *Circuit Courts* may be holden by any *one* or more of said Justices, and that any one of them might preside in Courts of Oyer and Terminer.

The constitution distinguishes between the general and special terms. This distinction does not consist in the number of Judges by which the terms may be holden respectively; although that circumstance may have been, and probably was, the occasion of the distinction. The constitutional authority of a decision of a special term, like that of a Circuit Court, would be the same whether made by one or four judges.

In the second place all concede that the entire jurisdiction in law and equity, secured by the constitution to the Supreme Court, can be exercised at a *general term* by three or more Judges. It follows that an authority subordinate in some respect, must be administered at a special term, or there is no difference between them. The words general and special import this distinction.

The meaning of "general" is that which comprehends all, the whole. (*Web. Dict.*) "Special," something designed for a particular purpose. Applied to jurisdiction, they indicate the difference between a legal authority extending to the whole of a particular subject, and one limited to a part, and when applied to the terms of Court, the occasions upon which these powers can be respectively exercised. Such I apprehend was the legal import of the words, "general and special" when applied to the terms of the "Supreme Court," as settled by the Courts and the Legislature; and the understanding of the legal profession at the formation of the present constitution. (13 *Wend.* 672, 655; 12 *Wend.* 230; 2 *R. S.* 259; §§ 2, 6, 9, 10, 11, 51; 3d *Ed.*; *Id* 229, § 25.)

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It has been said that by the 5th section of the above article, the Legislature possesses the same power as formerly, to alter and regulate the jurisdiction and proceedings in law and equity, and that this enables them to confer such jurisdiction as they may deem expedient, upon the Supreme Court, to be exercised at a general or special term, by one, or three, or more Judges.

To this suggestion it may be answered, that if by the constitution a distinction exists between these terms, it cannot be rightfully annulled either by legislative power or judicial construction.

In the second place, if there is no limit to their authority, in this respect, the Legislature may direct that *all* cases in law or equity, shall be determined at a special term, and that the decision shall be the final judgment of the Supreme Court. This of course would abolish the general terms which the constitution expressly recognizes. For it will scarcely be claimed that the right of three or more Judges to assemble, without the power of transacting business, satisfies the constitutional requirement for a general term. The same result would be produced, if the Legislature can direct that the same authority in all respects, shall be exercised at a special as a general term. The distinction between the two, studiously indicated in the constitution would be abrogated; and that instrument would in effect be made to declare, that all the business of the Supreme Court might be transacted at *any term* thereof, by *one* or more Judges, as the Legislature should by law provide.

Its language is, however, very different. It ordains that one Judge may hold a special and three a general term; unlike the constitution of 1821 in this respect, which provided that the Supreme Court should consist of three Judges, any one of whom might hold the *Court*.

If we are bound to give effect if possible to every word in a statute, the organic law is certainly entitled to equal consideration, and to determine, that the power to hold the Supreme Court at any term, which has the authority of a Judge under

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the former constitution, and the power to hold a special term, are identical, or that the phrase general and special mean the same thing, is equivalent to a declaration that the constitution imposes no restrictions upon Legislative power whatever.

I assume, therefore, that there is a constitutional difference between the special and general terms. This difference may consist, and it is the slightest that occurs to my mind, in this, that the decisions at the general term, are the only final determination of the Supreme Court, while those of the special term, are in all cases affecting the merits of the controversy, subject to review in the same Court, at a general term, at the election of the party aggrieved.

This distinction in the authority to be administered at the respective terms, will satisfy the language of the constitution, which demands a difference of jurisdiction, but does not define precisely in what that difference shall consist. It leaves the Legislature at liberty to confer such judicial power as the exigencies of the public may require, subject only to the restriction above mentioned, and relieves us from the necessity of resorting to the precise powers exercised at the special terms of the old Courts—which varied at different times, and in different Courts,—with a view to establish a constitutional limitation upon the authority of the Legislature. This construction is strengthened by the provisions of the 25th section of article 6, which declares—among other things—that the Legislature shall provide for the allowance of writs of error and appeals to the Court of Appeals, from the judgments and decrees of the Courts that may be organized under the constitution.

The Supreme Court possessing general jurisdiction in law and equity, was one of these; and when the constitution speaks of writs of error and appeals from this Court, I cannot but think that its authors referred to decisions made by a tribunal clothed with general jurisdiction in law and equity, and not merely a special authority, with all, and not with a part of the powers of the Supreme Court of the constitution. Decisions made at a special term by virtue of an authority

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however extensive yet less than that above mentioned, an authority granted by the Legislature and not given directly by the constitution, cannot with propriety be considered as the judgments and decrees of a Supreme Court within the meaning of the 25th section.

If this view is erroneous, then we have a Supreme Court with twenty-eight, instead of eight branches, and the uniformity of decision which the framers of the constitution supposed might be attained by the system as it came from their hands, is rendered impracticable. (*See Debates, Crosswell's Ed.* 372; *4th and 6th prop. of Mr. Ruggles; Remarks of Mr. Jordan*, 508, 513; *Mr. Kirkland's prop.*, 376.)

The judiciary act accords with this construction of the constitution. It was the manifest intention of the Legislature by that statute to afford to every suitor aggrieved by a decision at a special term, the opportunity of a re-hearing in the nature of an appeal in the same Court and before other Judges. (*Laws of 1847*, 325, § 20; *act to amend, ib.* 638, §§ 21, 22 and 23.)

The statute, it will be observed, confines the original hearing to the special term. Litigants therefore cannot elect their forum. If a review in the same Court is not a matter of right, every case *must* be *heard*, and can be finally determined by a single Judge, unless in the exercise of a discretion which cannot be questioned elsewhere, he should transmit it to the general term. In the second place, the right of either party to *apply* for a re-hearing, is absolute and unqualified, and co-extensive with the authority of the Judge at a special term to hear and determine. The authority to *refuse* the application is not granted to the Court by the *terms* of the statute, nor does it arise by any fair implication.

Thirdly, the technical re-hearing of the *Court of Chancery*, is not the re-hearing mentioned in the judiciary act. The former is provided for by the 16th section, which vests in the Supreme Court the jurisdiction possessed and exercised by the Court of Chancery, and the Judges, with the powers of the Chancellor. The right to grant a re-hearing, was one of the ordinary powers of a Court of Chancery.

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Fourthly, the re-hearing of Chancery does not extend to orders obtained upon motion, but is confined to decisions made upon the merits, and to a certain class of decretal orders. (1 *Barbour Ch. Pr.* 353.) But the right to a rehearing under the statute, applies "to every suit and proceedings that shall be heard and determined at a special term."

Fifthly, because by the practice of the Court the technical re-hearing must be sought from the same officer who originally heard and decided the cause. (*Fox vs. Mc Keath*, 2 *Cox R.* 159; 8 *Ves.* 564; 1 *Paige* 57.) The exceptions to the rule are, 1st, where the Judge who made the decree is not in office at the time of the application for a re-hearing. (*Gresley's Ev.* 410;) and 2d, those cases in which the re-hearing is in the nature of an appeal.

Now the judiciary act directs that the application for the re-hearing shall be made to a tribunal, all of whose officers may be, and a majority of whom *will* be, different from the one who has heard the cause. The error imputed to the decree or order must be fully brought before them, and this cannot be done but by a proceeding which, however denominated, will in effect be a re-hearing in the nature of an appeal.

And lastly, the hypothesis that an appeal will lie from a decree at a special term, leads to a conflict of jurisdiction. From an interlocutory order for example, the complainant may appeal, and the defendant apply for a re-hearing. But an appeal properly made, stays all proceedings, a re-hearing with others, (2 *R. S.* 608, § 86,) adopted by the judiciary act, § 11. If not stayed, in what Court are the errors of which both parties complain, to be corrected? This absurdity is avoided if the right of appeal is confined to decisions made at a general term.

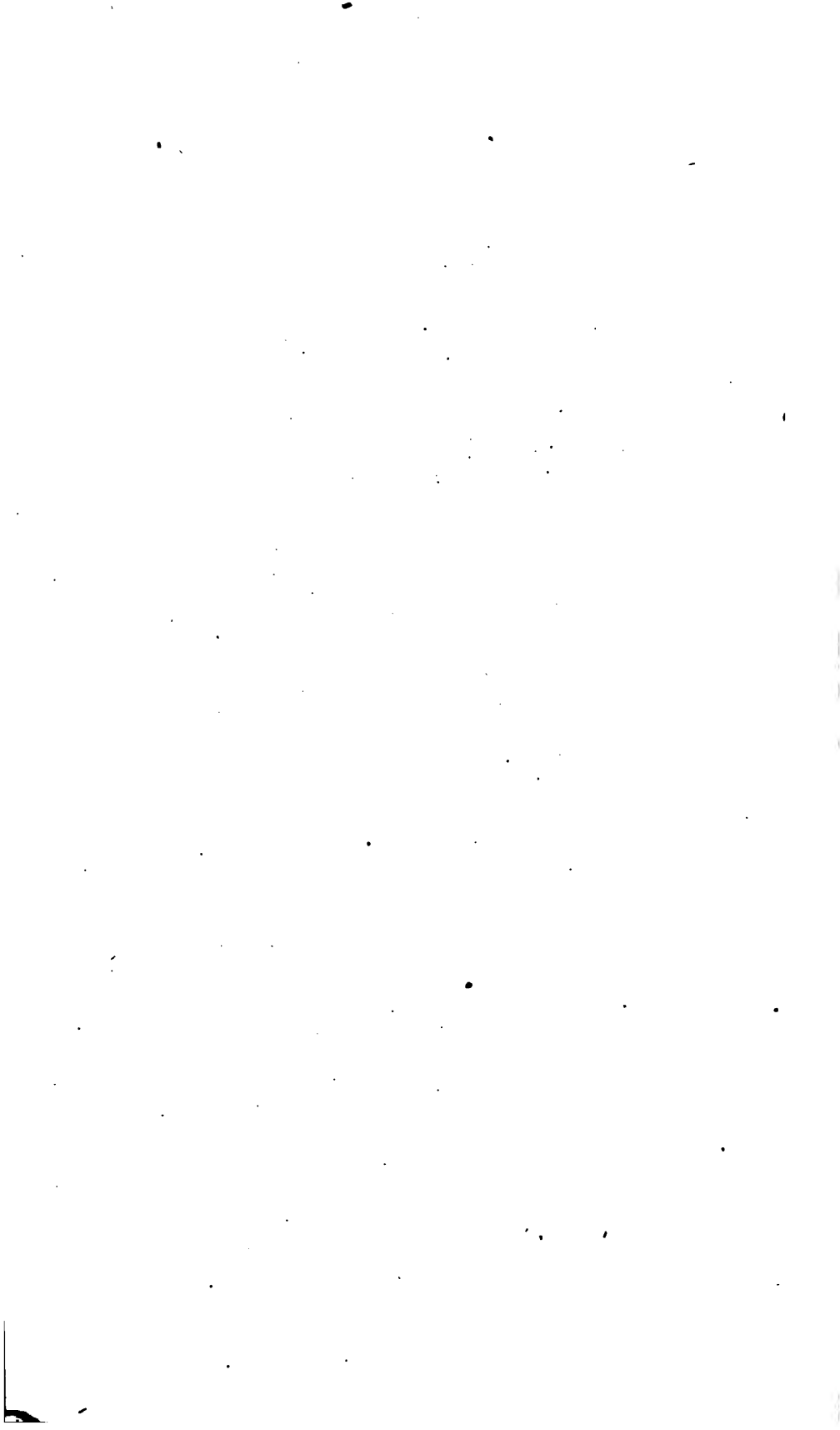
The above are some of the reasons which induce the belief that the Legislature used the term re-hearing, not in a technical but in its popular sense, as equivalent to a second hearing. They could not with propriety provide for an appeal, because this is an application after a complete judgment, to a Superior Court having a right to review that judgment. The

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Judges, at the special and general terms, although exercising a different authority, administer justice in the *same court*. Hence a method was adopted by which the cause could be reviewed, analogous to a re-hearing, inasmuch as it was by the *same court*, and in the nature of an appeal, because that review must be had before *different Judges*. (*Gresley's Ev.* 410.)

The order in question, not having been presented to the Supreme Court, at a general term, for review, is not therefore the subject of an appeal to this Court, according to the true intent and meaning of the constitution, and of the act in relation to the judiciary.

All the other Judges concurred in the result of the above opinions, and the appeal was accordingly dismissed.



CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW-YORK
IN APRIL TERM, 1848.

BURKLE *vs.* LUCE.

A defendant in error, who was prosecuted in the Court below for an act done by him as a public officer, is entitled to double costs in error, on the affirmance of the judgment.

The Court of Appeals does not lose jurisdiction of a cause brought up by writ of error, until the *remittitur* is actually filed with the Clerk of the Court below.

Double costs. The defendant in error was sued in the Supreme Court for an act done by him as a public officer. The judgment in that Court was in his favor, and was affirmed by this Court in January last. The usual entry of the judgment was made by the Clerk, giving only single costs, and without any request for that purpose the Clerk also made out a *remittitur* and sent it by mail to the Attorney for the defendant in error. The Attorney seeing that only single costs were allowed, did not file the *remittitur* in the Supreme Court, but kept it in his own hands, and now moved this Court, that the entry of the judgment be so corrected as to give double costs.

N. Hill, jr. for the motion, cited 2, *R. S.* 617, § 24; *Murray vs. Blatchford*, 2 *Wend.* 221.

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J. E. Carey, for plaintiff in error, insisted that as the *remittitur* had been sent to the Attorney for the defendant in error, who might file it in the Supreme Court at pleasure, this Court had lost jurisdiction of the cause. (*Delaplaine vs. Bergen*, 7 Hill 591; *Legg vs. Overbagh*, 4 Wend. 188.) Also that the statute allowing double costs did not apply to a defendant in a writ of error.

THE COURT held, that the statute gives double costs to public officers on writ of error as well as in the Court of original jurisdiction. Also, that the Court did not lose jurisdiction until the *remittitur* should be filed in the Court below; and as that had not been done in this case, that the motion might be granted, on condition that the Attorney return the *remittitur* to the Clerk of this Court to be cancelled.

Rule accordingly.

MARTIN vs. WILSON.

Where after affirmance of the judgment of the Court below, a *remittitur* has been sent to and filed with the Clerk of that Court, this Court loses jurisdiction of the cause, so that it cannot open a default therein.

O. W. Sturtevant, for the plaintiff in error moved to open a judgment of affirmance by default in this case at the last January term, and read affidavits excusing the default.

J. H. Magher, for the defendant in error, read an affidavit showing that a *remittitur* had been issued and duly filed in the Supreme Court.

THE COURT held that it lost jurisdiction of the cause when the *remittitur* was filed in the Court below, and on that ground

Denied the motion.

Jewell v. Schouten.

JEWELL vs. SCHOUTEN.

Where the attorney for the plaintiff in error removed from the State, and notice had been given to the party to appoint another attorney pursuant to the statute (2 R. S. 287, § 67.) held nevertheless, that a motion to quash the writ of error could not be made, without notice thereof to the plaintiff in error.

_____ for defendant in error moved ex parte to dismiss the writ of error in this cause. It appeared from the affidavits on which the motion was made, that in the summer of 1846, the attorney for the plaintiff in error, removed out of the State to reside; that in October of that year, a notice was served upon the plaintiff in error to appoint another attorney, and that none had been appointed. 2 R. S. 287, § 67, and *The Chautaque County Bank vs. Risley*, 6 Hill 375, were cited.

THE COURT held that notice of the motion should have been given to the plaintiff in error, and, therefore, that the motion should be denied without prejudice.

Ordered accordingly.

Sparrow v. Kingman.

1 242
149 450

SPARROW vs. KINGMAN.

In ejectment for dower against a grantee of the husband by *quit claim deed*, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seized of such an estate in the premises as to entitle his widow to dower.

The cases of *Sherwood vs. Vandenburg*, (2 Hill 303,) *Bourne vs. Potter*, (17 Wend 164,) and other similar cases in the Supreme Court, considered, and in this respect overruled.

Error from the Supreme Court. Elizabeth Kingman brought ejectment in the Common Pleas of Erie County, against Erastus Sparrow to recover an undivided sixth part of certain premises as the widow of George G. Kingman, deceased. After issue joined, the cause was removed by *certiorari* into the Supreme Court, and was tried at the Erie Circuit, before DAYTON, Circuit Judge, in January, 1846. On the trial, the marriage of the plaintiff, and the death of her husband, were admitted.

The plaintiff proved that her husband, George G. Kingman, and Philo Durfee, were in possession of the premises from 1837 to 1840 inclusive, claiming as owners, and built certain mills thereon called the "Erie Mills;" that in February, 1841, Kingman gave a quit claim deed of his interest in the premises to S. J. Holley, and that in August, 1841, Durfee also gave a quit claim deed of his interest in the premises, (declared in the deed to be an undivided half) to the defendant. That in April, 1842, the defendant and Holley united in a quit claim deed of the premises to Ira B. Carey, and that the defendant, at the commencement of the suit, was in possession under a lease from Carey. The defendant offered to shew that Kingman never had any estate in the premises of which his wife was dowable, but that his estate was a leasehold estate merely; also that he never had any title whatever to the premises. The evidence so offered was objected to by the plaintiff, and excluded by the Circuit Judge on the ground, that as Kingman, when in possession, had, by his deed to Holley, assumed to convey a fee, and as the defend-

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ant held under that deed, he, the defendant, was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowerable. The defendant excepted. A verdict was had for the plaintiff, and the defendant, upon bill of exceptions, moved in the Supreme Court for a new trial, which motion was denied, and judgment rendered for the plaintiff. The defendant brings error.

H. S. Dodge, for plaintiff in error.

I. The Circuit Judge erred in excluding the evidence offered to show that Kingman never had any estate in the premises.

1. The acceptance by Holley of Kingman's quit-claim deed-poll to him, did not estop him, or those claiming under him, from showing that Kingman had no title. An estoppel by acceptance of possession is only in pais, and therefore only applies to a lessee or other grantee, who is under obligation to restore the possession. (*Co. Littleton*, 352, a; *Watkins vs. Holman*, 16 *Peters*, 25; *Small vs. Proctor*, 15 *Mass. R.* 499; *Osterhout vs. Shoemaker*, 3 *Hill*, 518.)
2. There can be no estoppel for want of mutuality; Kingman himself would not have been estopped by his quit-claim deed from showing that no title passed by it. (*Jackson vs. Hubbell*, 1 *Cowen*. 616; *Jackson vs. Bradford*, 4 *Wend.*, 622; *Jackson vs. Waldron*, 13 *Wend.*, 178.)
3. His widow would not be estopped, even if he had covenanted, and therefore she cannot estop the grantee. (2 *Smith's Leading Cases*, p. 438; *Jewell vs. Harrington*, 19 *Wend.*, 471; *Gaunt vs. Wainman*, 3 *Bing.*, *N. C.* 69.)

II. The Circuit Judge erred in excluding the evidence offered to shew that Kingman had an estate for years, or some other estate not of inheritance.

1. The cases relied upon on the other side, were cases where the offers were to shew *no title* in the husband, not to

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shew a *less estate*, and if they are conceded to be law, they do not determine this question.

2. There is no estoppel where an interest passes ; in other words, it may always be shewn that a less estate passed than the estate mentioned in the deed, although it be an indenture. (*Treport's Case*, 6 Rep. 146 ; 2 *William's Saunderson's* 418 note 1 ; 2 *Smith's Leading Cases* 438, 457).

III. But the foundation of the argument to prove an estoppel, i. e. in the words of the Circuit Judge, that "by the deed to Holley, Kingman *assumed to convey a fee*," wholly fails in the present case.

1. The deed is a mere quit claim and release, and therefore only purports to convey the right that the grantor had, and for that reason never could operate as an estoppel. (*Right vs. Bucknell*, 2 B. and Ald. 278.) At most, the deed merely affirms that Kingman was entitled to a fee, or *some other estate*, and there could be no estoppel from such an uncertain recital if it had been made expressly. (*Right vs. Bucknell*, *ubi supra*.)
2. If there ever were any doubt of this point, there can be none since the provisions of the Revised Statutes. (1 R. S. 738, 739, §§ 136, 140, 142, 143, 144, 145 ; also, 1 R. S. 748, § 1, 2).
3. The deed, therefore, from Kingman to Holley, was intended and assumed to pass whatever estate and interest Kingman had without defining it, and must be read as if it had expressly so stated its object.

N. Hill, Jr., for defendant in error.

I. The actual possession and use of the premises by the plaintiff's husband, claiming to be owner, and building the "Erie Mill's" thereon, proved such an estate in the husband as entitles her to dower. (*Bowne vs. Potter*, 17 Wend. 164 ; *Carpenter vs. Weeks*, 2 Hill, 341 ; *Sherwood vs. Vandemburgh*, do. 303 ; *Jackson vs. Walter*, 5 Cow. 301.)

II. The Circuit Judge correctly ruled that the defendant

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was estopped from denying the title of Kingman, the plaintiff's husband, inasmuch as he was in possession of the whole estate under the deed from Kingman, and held by the same title that Kingman did. (*Hitchcock vs. Harrington*, 6 Johns. 290; *Collins vs. Torrey*, 7 do. 278; *Hitchcock vs. Carpenter*, 9 do. 344; *Davis vs. Darrow*, 12 Wend. 65; *Bowne vs. Potter*, 17 Wend. 164; *Sherwood vs. Vandenburg*, 2 Hill 303.)

WRIGHT, J. On the trial, at the Circuit, the marriage of the plaintiff below with George G. Kingman, and the death of the latter, were admitted; and when the plaintiff rested her cause, she had *prima facie* established a seizin in fee of her husband, in his lifetime, in the lands from which dower was demanded. For this purpose, it was sufficient to shew his actual possession of the premises, claiming as owner. This is presumptive evidence of seizin, and sufficient until the contrary appears. (2 *Philips evidence* 282; 2 *John R.* 123, 5 *Cowen* 301.) But she went further, shewing a quit claim or release of the premises from her husband to S. J. Holley, and from Holley and others by successive releases to the landlord of the defendant. To rebut the presumption of seizin, arising from this evidence, the defendant offered to shew affirmatively that Kingman never had any title to the premises, or that, at most, he had but a leasehold estate, of which his wife was not dowable. The Circuit Judge rejected this evidence, and decided that as Kingman, when in possession, had by his deed to Holley, *assumed to convey a fee*, and as the defendant held under that deed he was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowable, and that upon the evidence given, the plaintiff was entitled to a verdict.

I am of opinion that it will be difficult to rest this decision upon sound principle, or to reconcile it with the doctrine of estoppels, as generally understood and expounded by the Courts; although I am aware that there are several cases in our own Courts, that hold that a grantee of the husband, is estopped from denying his seizin in an action of dower

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brought by the widow. (6 *John. R.* 398; 7 *J. R.* 279; 12 *Wend. R.* 47; 17 *Wend.* 164; *See* 2 *Hill* 207; 3 *Hill* 518.) Perhaps, the case of *Bowne vs. Potter*, (17 *Wend.* 164) is the only one that may be said to entirely assimilate with the present. The error originated in a *dictum* of a Judge of the Supreme Court, in an early case, and has been followed until the present time; recently, not because the misapplication of the law of estoppels was not distinctly seen by the learned Judges who sat in the Supreme Court, but for the reason that the rule had been conclusively settled for them by repeated adjudications of the predecessors. Here, however, the question is not *res adjudicata*, and we shall be at liberty to reject the rule, if it shall be found, on examination, irreconcilable with the doctrine of estoppels *in pais*, and unsupported by principle or binding authority.

If the grantee in fee is estopped from denying the seisin of his grantor, a uniform and invariable application should be given to the rules. Indeed, the reason is not so strong for applying it in dower cases (in which only it has been fully applied) as in cases arising immediately between grantor and grantee, or those claiming under conveyances from the grantor. If the grantee, therefore, is invariably estopped, the grantor, also, is concluded; for it is a principle of the law of stoppels that they must be mutual. But, I am not aware that it has been latterly doubted, that a grantor who conveys, or releases, without interest in the lands conveyed or released, may not show that he had no title to pass by his conveyance; unless, in the conveyance itself, by way of recital or otherwise, he represents himself to be the owner of the premises, or having some particular interest therein, which it would be fraudulent to permit him to gainsay or deny. The recital, in a conveyance with certainty of a particular fact forming an inducement for the contract, will bind the grantor, but otherwise there is no estoppel. General words will not have this effect. When a grantor conveys, without title, but with covenant of warranty, he will be concluded, and an after acquired estate will pass to the grantee,

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not because the party conveying had a title at the execution of his deed, or that the law will presume such an absurdity, but by way of avoiding circuity of action. An equitable estoppel will be interposed. The grantor has solemnly covenanted that he had title at the date of his conveyance, and has agreed to warrant and defend it; the law will not permit the grantee to be evicted, and put to his action against the grantor on the covenant; or in other words, it will, in an action by the latter to recover the possession of the premises, estop him "from impeaching a title to the soundness of which he must answer on his warranty." But the grantor is not concluded unless an action may be brought against him. A quit claim deed only purports to release and quit claim whatever interest the grantor may then have in the premises. If he have none *in esse* at its delivery, nothing passes; and not having covenanted to be answerable for the soundness of the title conveyed, should the grantor afterwards acquire a valid estate in the premises, he could not be chargeable with bad faith in attempting to enforce it. In such a case he could not be met by any direct admission on his part, inconsistent with the title or claim he purposed to set up, and upon which the other party could have an action, and which would create an injury to such party by allowing it to be disproved. Kingman, the grantor in the present case, therefore, would not have been estopped by his quit claim deed to Holley from showing either that no title passed by it, or that the estate conveyed was less than a fee. (1 Cowen 616; 4 Wend. 622; 13 Wend. 178; 3 Hill 219.) The Circuit Judge grounded his decision upon the fact "that Kingman, when in possession, had by his deed to Holley, *assumed to convey a fee.*" This, it seems to me, was an unwarrantable construction of the deed. It was an ordinary quit claim, that might be, and often is used, to pass an estate less than a fee. Kingman, by giving it, could assume nothing in relation to the extent or nature of the estate. The law fixes the force and effect to be given to the instrument. It could pass no greater estate or interest than the grantor himself possessed at the delivery of it.

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Had Kingman been a tenant for life or years, or seized in fee, all his title, estate or interest would have passed to the grantee by the conveyance which he executed, and nothing more. (1 R. S. 739, §§ 142, 143, 145.) The deed, therefore, from Kingman to Holley, *assumed* to pass whatever estate and interest Kingman had without specifically defining it.

If the grantor, then, might shew that no title passed by his quit claim, and recover the land in opposition to it, why should the mouth of his grantee be closed from denying that he received an estate in fee from him, or that, indeed, any title passed by his conveyance? Apply the rule of mutuality, and it is impossible to assign a valid reason. Both parties must be bound, or intended to be, else neither is concluded. There can be no soundness in the principle of estopping a grantee from shewing that no interest passed to him by the deed of the grantor, while the latter is permitted to shew it. But, it may be further observed, that this was an action for dower brought by Kingman's widow, and had Kingman conveyed the premises to Holley, with covenant of warranty, and thereby, by the doctrine of equitable estoppel, concluded himself from denying that a title passed by his deed, the widow could not have been affected. His covenant could not have estopped her. She would have been neither a party nor privy, but a stranger to the conveyance, claiming by paramount title. She would not be concluded if the grantor was, and by the rule of mutuality, as against a stranger, the grantee should not be. In the case of *Gaunt vs. Wainman*, (3 Bing. N. C. 69,) the tenant was permitted to shew the land to be leasehold, although it was set forth as freehold in the deed to himself which was produced at the trial. *Tindall, C. J.* said, that "if an estoppel existed it must of necessity be mutual; but that it could not be contended that if a husband conveyed freehold as leasehold, his widow would be concluded from shewing the real nature of the estate;" and he therefore held that the same right existed in the tenant. In the case under consideration the defendant below proposed to

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show that Kingman had but a leasehold estate, even, admitting that by his quit claim he assumed to convey a fee; and in this respect, the case of *Gaunt vs. Wainman*, is in direct conflict with the ruling of the Circuit Judge. It has, also, been held that if baron and feme join in a lease for years, by indenture, rendering rent, where the baron hath all the estate and the wife nothing; after the death of the baron the lessee, in action of debt brought by the feme, shall not be concluded to say that at the time of the lease made, the feme had nothing in the lands, because the feme being covert was not estopped, and, by consequence, neither shall the lessee, for the reason that all estoppels ought to be mutual. (*Bacon's Abrdg. Title Leases, (O.) and Cases cited.*) To hold therefore, that the grantee is estopped, when sued by the widow, from shewing that his grantor had no estate in premises, or a less estate than his deed purported to convey, whilst the widow not being a party or privy to the conveyance, is not barred, is a violation of Lord Coke's first rule, viz: that "estoppels ought to be reciprocal."

It is contended that the grantee is concluded by acceptance of the deed. But, waiving the doctrine of mutuality, this cannot be, unless there be an estate which has actually passed to the grantee by it, co-extensive with its description in the conveyance. The mere acceptance of a deed-poll, when no interest actually passes by it, surely cannot conclude the party accepting. Such a conclusion would be totally irreconcilable with every principle of the law of estoppel *in pais*. Lord Coke, in treating of estoppels in pais, includes that "by acceptance of an estate," but he distinctly illustrates his meaning, by an example which he gives of a case put by Littleton, viz: of a common law assurance by feoffment without writing accompanying it. Such an assurance operated on the possession, and if correctly pursued always passed a freehold or fee simple to the feoffee. But in the case of a conveyance by grant, bargain and sale or release, in which it is never necessary that actual possession should accompany the deed, the very point is whether an estate existed in the grantor, and

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has passed, to be accepted. In *Taylor's case* 34 Eliz. (cited in *Sir W. Jones* 317) which has been relied on to sustain the doctrine that a grantee is estopped in dower cases to deny the seizin of the husband, it was held that if a tenant at will or for years make a feoffment in fee and died, and his wife brought dower against the feoffee, he could not plead that the husband was not seized. This is the case of a tortious feoffment, in which the feoffee has obtained and retains the actual seizin of the lands by a wrong, in which he is in some degree a willing participant. It is to be remembered that to make a valid feoffment, nothing was wanting but possession, and when the feoffor had possession, though a mere naked one, a freehold or fee simple passed to the feoffee by reason of the livery. This livery of seizin was the investiture or delivery of corporal possession of the land to the feoffee, and was absolutely necessary to complete the gift. It was a corporal transfer of the soil from one man to another taking effect *in presenti* or not at all. The feoffee was a principal actor in the transfer, and passed at once into the full enjoyment of the fee. (*Litt.* § 595, 599, 611, 698; *Co. Litt.* 366, 367 a; 2 *Black Com.* 310, 313.) The feoffment, which could not be made without an acceptance of the possession by the feoffee, whether tortious or not, operated as a disseisin of the owner, and although he had a right of entry by action in the case of a tortious disseisin, that right might be tolled by a descent cast. Consequently, it will be seen that the acceptance of an estate passed by feoffment and livery of seizin differs widely from the acceptance of a modern conveyance by grant, in which it is never necessary to give it validity, to enter and take corporal possession of the land, and by which the grantor may obtain a fee, or a less estate, or no estate at all. The former was one of those solemn notorious acts *in pais* to which the common law attaches peculiar and extraordinary efficacy and importance; as much so as to matters shown by record or writing under seal. Hence, Lord Coke in enumerating estoppels *in pais* includes such an acceptance. But who ever heard, at common law, that where an interest

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in lands was attempted to be conveyed by deed-poll, without livery, that the grantee who accepted the deed was estopped from controverting the seizin of the grantor, or in other words from shewing that nothing, or a less estate than a fee, passed by such deed? Even in the case of a lessee by deed-poll it was formerly held that he might dispute his lessors title. (*Co. Litt.* 47 b.; *Litt. Sec.* 58; 1 *Ld. Raymond* 746.) A conveyance by feoffment, with livery of seizin, has long fallen into disuse even in England, and, at least with us, a grant without the ceremony of livery is made competent to convey and pass all the estate and interest which the grantor can lawfully convey. Indeed, a grant never passed any thing more. (*Litt.* § 608.) The grant not operating directly upon the possession as in the case of a feoffment, but simply on the estate and interest which the grantor had in the premises granted, if nothing actually passes, it is obvious there can be no acceptance of an estate; or if the grantor have a less estate than he conveys, only the estate which he has passes, and the acceptance must necessarily be of the estate passed. So that in the conveyance of lands by deed, the question whether there has been an acceptance of an estate by the grantee, and the extent of it, depends on the solution of the prior question whether the grantor had any estate to convey, and if he had, what is its real nature. A point which must be determined by proof *aliunde*. In the present case the opportunity was denied to the defendant below of solving the question whether Kingman had any estate or interest to pass by his deed; and if he had, the nature and extent of it; and the Judge assumed that the mere acceptance of the instrument, whether it passed any thing or not, was sufficient to estop the defendant from controverting Kingman's seizin.

It was intimated in the case of *Springstein vs. Schermerhorn*, (12 *John R.* 363) that Coke *Litt.* 47, b. was an authority to shew that a grantee generally, under any form of conveyance, was concluded from denying the title of his grantor. But the doctrine is far from being sustained by the authority. It is this, "that if a man takes a lease for years by indenture

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of his own lands, whereof he himself is in actual seizin and possession, this estops him during the time to say that the lessor had nothing in the lands at the time of the lease made, but that he himself, or such other person, was then in actual seizin or possession thereof; *for by acceptance thereof by indenture* he is, for the time, as perfect a lessee for years, as if the lessor had at the time of the making thereof an absolute fee and inheritance in him." The remarks of the learned text writer are limited to a *lease indented* in which the grantee is estopped by his own contract under seal, and not by an act *in pais*. The extent of the authority is that the lessee is concluded by his own deed, for it is immediately said, "but if such lease for years were made by deed-poll of lands wherein the lessor had nothing, this would not estop the lessee to aver that the lessor had nothing in those lands at the time of the lease made; because the deed-poll is only the deed of the lessor, whereas the indenture is the deed of both parties, and both are as it were put in and shut up by the indenture, that is where both seal and execute it, as they may and ought." (*Co. Litt.* 47, b. *Bacon's Abrg.* "Leases." (O)). It is not law now, that a lessee even by deed-poll, who retains possession under his lease, may dispute the title of his lessor, but it was in the time of Lord Coke, and hence the illustration is pertinent and conclusive in limiting and defining the extent of the authority cited. Again, it has been repeatedly held that it may be shewn that a less estate passed than the estate mentioned in the deed, although it be an indenture; which could not be, if the rule was universal that a grantee is concluded by an acceptance of the conveyance. (3 *Wms. Saunders* 418, note a; 2 *Smith's Leading Cases*, 457; 4 *Kent's Com.* 98.) No proposition can be more undoubted, than that the grantee in a deed-poll is never estopped by the terms of the grant, for it is not his deed, not having sealed and executed it; and it seems a sheer absurdity to say that he is concluded by acceptance of a conveyance, by which no estate actually passed to him, for the reason that the grantor had none to convey. Such a doctrine is entirely irreconcilable with the system of modern

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conveyancing and transfer of lands, and if carried out would lead to innumerable and perplexing difficulties. Actions on covenants of seizin, or warranty, or for quiet enjoyment are of daily occurrence, but how would it be possible ever to maintain them, if a grantee by an acceptance of the deed of his grantor, is barred from showing a paramount title, or a defect in the estate of the latter? If this rule prevailed, these covenants in our modern conveyances might be inserted as ornaments, but would be of little practical utility.

Chief Justice Nelson, in the case of the *Welland Canal Company vs. Hathaway*, (8 *Wend.* 483,) defined the doctrine of an estoppel in pais as follows: "As a general rule, a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." He adds that the party will be concluded "when in good conscience and honest dealing he ought not to be permitted to gainsay" his acts or admissions. Bronson, J., in *Dezell vs. Odell*, (3 *Hill* 225) adopts this definition with approbation, and adds, "A party is only concluded against shewing the truth, or asserting his legal right, when that would have the effect of doing a wrong through his means to some third person." Under such circumstances, Justice Cowen remarks, in the latter case, "for the prevention of fraud, the law holds the act or admission to be conclusive." It must, however, have been acted upon by the other party. The party who accepts the deed in fee of a grantor having no title or a less estate than he conveys, performs no act expressly designed to influence and influencing the conduct of the latter to his injury; nor does he make any admission which, "in good conscience and honest dealing, he ought not to be permitted to gainsay." The fraud, if any there be, is on the part of the grantor, and the injury will fall solely upon the grantee, unless he be permitted to shew the truth. There is no relation existing between the grantee in fee and his grantor, as will raise even an implied obligation on the part of the former against a denial of the title and estate

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of the latter. In *Osterhout vs. Shoemaker*, (3 Hill 518) the Court undoubtedly lays down the true rule. Bronson, J., in delivering the opinion of the Court, says: "Although a tenant cannot question the right of his landlord, a grantee in fee may hold adversely to the grantor, and there can be no good reason why he should not be at liberty to deny that the grantor had any title. There is no estoppel where the occupant is not under an obligation, express or implied, that he will at some time or in some event, surrender the possession. The grantee in fee is under no such obligation. He does not receive the possession under any contract, express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of it at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title." (*See also 15 Mass. R. 499.*) The reason of the rule is readily seen why a tenant in possession may not question his landlord's title, or a vendee, under an agreement to purchase, that of the vendor. He has obtained the possession which he would not otherwise have had, "under an obligation, express or implied, that he will, at some time or in some event, surrender it." The law will hold him to his obligation. But even in the case of a tenant or vendee, should he first restore the possession, there would be no obstacle in the way of controverting the landlord or vendor's title. Originally, at common law, as we have seen, the lessee by deed poll might always dispute the estate of the lessor; and he is now permitted to shew that the landlord had a less interest than he demised. In *Doe vs. Barton*, (11 Adol. and Ellis 815,) it was held that in ejectment the tenant may protect his possession against his landlord by shewing that the title of the latter was defeasible under a prior mortgage, at the time the lease was made, and that he has since been compelled to pay rent to the mortgagee, and put him in constructive possession of the premises. Thus, even in the case of a lessee where there has been a constructive eviction, as in *Doe vs. Barton*, he may shew a state of facts in the protection of his possession, inconsistent with the

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claim or title of his lessor. Where there has been an actual eviction by title paramount, this right has never been doubted. It would, therefore, be strange indeed, if a grantee in fee, who is never under any obligation to restore the possession, and who may have been compelled to purchase in for his protection an outstanding valid title, should be concluded from shewing that no title passed by the deed of his grantor, or that the estate or interest which passed was less than that mentioned in the deed.

I am of the opinion that the judgment of the Supreme Court should be reversed, and am content to place my vote for reversal on the distinct ground, that in an action for dower the grantee in fee of the husband is not concluded from affirmatively controverting the seizin of the latter. This is the law of England and of Massachusetts, and if an opposite rule has heretofore prevailed in this State, it is not too late to correct the error. Where property has been acquired, or rights matured, and exist, under an erroneous decision of the Courts, insomuch that irreparable mischief and injury must necessarily result from its overthrow, the maxim of *stare decisis* should prevail. But this is not one of those errors, from the correction of which injurious consequences may follow.

JEWETT, CH. J. The question to be decided in this case is, whether it was competent for the defendant to show, that Kingman never had any estate of inheritance in the premises. The Judge decided that as Kingman, when in possession had by his deed to Holley, assumed to convey in fee, and as the defendant held under that deed, he was bound by it, and was estopped from setting up that Kingman had not an estate of which his wife was dowable.

It cannot be denied, but that the decision of the Judge on the trial is in conformity with the principles settled by a series of cases determined by the Supreme Court, from *Bancroft vs. White*, (1 *Caines* 185) to *Sherwood vs. Vandenburg*. (2 *Hill* 303.) In the latter case, however, the late Mr. Justice Cowen put his opinion upon the ground of the authorities,

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and not upon the ground, that the doctrine of estoppel had been in those cases correctly applied, and distinctly suggested that the question was a very fit one for review in the Court for the correction of errors. And Mr. Justice Bronson in *Osterhout vs. Shoemaker*, (3 *Hill* 513) remarked in reference to the cases which hold, that in dower the grantee of the husband is estopped to deny the grantor's title, that they were to be followed because the rule had been so settled, and not because it rested on any sound principle.

As defined in the books, "an estoppel is when a man is concluded by his own act or acceptance, to say the truth," of which there are three kinds. By matter of record, by deed, and by matter of pais. The estoppel which the plaintiff claims in this case arises by matter in pais, if at all; that species arises, by livery, by entry, by acceptance of rent, by partition, and by *acceptance of an estate*. (*Co. Litt.* 666, 667.)

The principle in respect to that, which arises by an acceptance of an estate, is, that a man shall not be permitted, during his possession of premises, to dispute the title of the landlord under whom he entered, and applies only in cases where the party accepting the estate is under some obligation, express or implied, that he will at some time or in some event surrender the possession. "The grantee in fee, is under no such obligation. He does not receive the possession under any contract express or implied that he will ever give it up. He takes the land to hold for himself, and to dispose of it at pleasure. He owes no faith or allegiance to the grantor, and does him no wrong when he treats him as an utter stranger to the title."

The deed from Kingman to Holley was a mere quit claim, deed-poll, of one part, signed by Kingman only. Therefore, no one at common law, would be bound by it, but he, and it would not work an estoppel against the grantee, and I think not as against the grantor. (*Co. Litt.* 47, 61, *Shep. Touch.* 1 *Am. Ed.* 53, *Right vs. Bucknell*, 2 *Barn and Adol.* 278.) At the common law, all the parts of a deed indented in judgment of law made but one deed, and every part was of as

great force as all the parts together, and were esteemed the mutual deeds of either party, and either party might be bound by either part of the same, and the words of the indenture were the words of either party. It was stronger than a deed-poll, for it worked an estoppel against either party to say or except any thing against any thing contained in it. (1 *Sheph. Touch.* 53 *Plow.* 434.)

The argument on the side of the plaintiff is that Kingman *assumed to convey a fee*; and that as the defendant held under that deed, he was bound by that assumption. This, I think is founded upon a mistake of *fact* as well as of law. I have already remarked that the deed is merely a quit claim deed-poll; and therefore, upon its face and by its terms, it only purports to convey whatever interest in the premises the grantor then had. It does not affirm that he had any. How then can the grantor be supposed conclusively to admit that he had? If the admission should be co-extensive with the grant, it would be but conditional; that is, that if the grantor had any right or interest, which passed by his deed it vested in Holley the grantee.

And now, by 1 *R. S.* 739, § 143, it is enacted that no greater estate or interest shall be construed to pass by any grant or conveyance, thereafter executed, than the grantor himself possessed at the delivery of the deed, or could then lawfully convey, except that every grant should be conclusive as against the grantor and his heirs claiming from him by descent; and by § 145, it is declared that a conveyance made by a tenant for life or years, of a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantor all the title, estate, or interest, which such tenant could lawfully convey.

And again, by 1 *R. S.* 748, § 1, it is declared that every grant or devise in real estate, or any interest therein, thereafter to be executed, shall pass all the estate, or interest of the grantor or testator; unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of such grant; and § 2 provides

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that in the construction of every instrument creating or conveying, or authorizing the creation or conveyance of, any estate or interest in lands, it shall be the duty of Courts of Justice, to carry into effect the intent of the parties, so far as it can be collected from the whole instrument, and is consistent with the rules of law. Now, I do not think that we are authorized to say that Kingman assumed by his deed to convey a fee; the clear intent, as well as expression of his deed, is to convey only what interest or estate he then had in the premises. But again. *Co. Litt.* 352 *a*, shows, that every estoppel must be reciprocal, that is to bind both parties, and that is the reason that, regularly, a stranger shall neither take advantage of, nor be bound by, the estoppel; but privies in blood, as the heir, and privies in estate, as the feoffee, lessee, &c.; privies in law, as the lord by escheat, tenant by the courtesy, tenant in dower, the incumbent of a benefice, and others that come in under by act of law, or in the post, shall be bound by, and take advantage of estoppels; and Coke, in his twenty-first reading on fines, says "estoppel is reciprocal on both sides; for he that shall not be concluded by a record or other matter of estoppel, shall not conclude another by it." (*Doe vs. Martin*, 8. *Barn. and Cress.* 497.)

Now Kingman himself would not have been estopped by his deed to Holley from showing that *no title* passed by it, on the ground that it contains no covenant of warranty; an after acquired estate by a grantor passes to his previous grantee by the rule of estoppel, only when there are such covenants of warranty, and then to avoid circuity of action. (*Jackson vs. Hubbell*, 1 *Cowen* 616; *Jackson vs. Bradford*, 4 *Wend.* 622; *Jackson vs. Waldron*, 13 *Wend.* 178.)

The plaintiff could not claim any thing by the rule of estoppel, in respect to the deed executed by her husband to Holley. She is a stranger to it; her right to dower rests upon the title or estate which her husband acquired prior to his deed to Holley, and is derivable under his grantor. This would be a sufficient reason why she could not estop the grantee of her hus-

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band. There would be no mutuality, as she would not be bound by it. (*Jewell vs. Harrington*, 19 *Wend.* 471.)

The plaintiff is not entitled to dower in any other lands than in which her husband, during the marriage, was seized of an estate of inheritance; and I think it clear that when she claims dower, the defendant is at liberty to show in his defence that her husband was not, during the marriage, seized of such an estate. (*Gaunt vs. Wainman*, 3 *Bing. N. C.* 69.)

I am therefore of opinion that the judgment should be reversed, and that a *venire de novo* should be awarded by the Supreme Court, with costs, to abide the event.

RUGGLES, JONES, JOHNSON and GRAY, Js., concurred in the result of the preceding opinions.

BRONSON, J., dissenting. As to one-half of the Erie Mills, the defendant derived his title and possession from George G. Kingman, the plaintiff's husband; and still holds under that title. So long as he thus holds, he is estopped from denying the seizin of the husband, in an action brought by the widow to recover her dower. (*Hitchcock v. Harrington*, 6 *John.* 290; *Collins v. Torry*, 7 *John.* 278; *Hitchcock v. Carpenter*, 9 *John.* 344; *Davis v. Darrow*, 12 *Wend.* 65; *Bowne v. Potter*, 17 *Wend.* 164; *Sherwood v. Vandenburg*, 2 *Hill* 303.) Questionable as I think this doctrine was at the first, (2 *Hill* 308, 3 *Hill* 518, 519,) it has prevailed too long in this State to be now overturned by a judicial decision. If there is any good reason for changing the rule, the change should be made by the Legislature, and not by the Courts.

In Maine and New Jersey the rule is the same as it is with us. (*Kimball v. Kimball*, 2 *Greenl.* 226; *Nason v. Allen*, 6 *id.* 243; *Hains v. Gardner*, 1 *Fairf.* 383; *Hamblin v. Bank of Cumberland*, 19 *Maine*, (1 *Appleton*) 66; *English v. Wright*, Coxe (*N. J.*) *Rep.* 437.) In Massachusetts it is the other way. (*Small v. Procter*, 15 *Mass.* 495.)

So long as those claiming under the husband have not been disturbed in the enjoyment of the property, there is no very

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good reason for allowing them to defeat the widow's claim to dower, by setting up an outstanding title, which may never be asserted; and the current of adjudication in this State has not carried the estoppel beyond cases of that description. There is, I admit, no principle upon which the estoppel can be carried another step, and applied to a case where the husband's grantee has been obliged to purchase in a good outstanding title for the purpose of protecting his possession; and if the case of *Bowne v. Potter*, (17 Wend. 164,) must be considered as going that length, I agree that it cannot be supported. But there is no such question in this case.

This writ of error has, I presume, been brought in consequence of the opinion which had been expressed by Mr. Justice Cowen and myself, and which opinion I still entertain, that originally the doctrine of estoppel was improperly applied to this class of cases. (*Sherwood vs. Vandenburg*, 2 Hill 308-9; *Osterhout v. Shaemaker*, 3 id. 518-19.) But it will be seen that neither of us felt at liberty to depart from the rule as it had been settled, nor do I feel so now. After an erroneous decision touching rights of property has been followed thirty or forty years, or even a much less time, the Courts cannot retrace their steps without committing a new error nearly as great as the one at the first.

The defendant's counsel places great reliance upon a remark of Mr. Justice Cowen, to the effect, that although the point was too firmly established to be revised by the Supreme Court, it might still be a fit question for review in the Court of Errors. There was, I think, a good deal of irony in that remark. Surely the learned Judge did not intend to be understood that what was settled law in one Court, was not also good law in all the other Courts of the State; that a Justice of the Supreme Court, when sitting in his own Court, was bound to decide one way, and when sitting in the Court of Errors, was at liberty to decide the other way. The thing is preposterous. The remark in question was made concerning a Court which not only corrected erroneous decisions, but sometimes took the liberty of reforming the law itself, where it was supposed to

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need improvement. I claim no such prerogative. I am of opinion that the judgment of the Supreme Court should be affirmed.

GARDINER, J., having been engaged professionally in the cause, gave no opinion.

Judgment reversed, and *venire de novo* awarded.

SHINDLER vs. HOUSTON.

Plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "*the lumber is yours.*" The defendant then told the plaintiff to get the Inspector's bill, and take it to one House, who would pay the amount. This was done the next day, but payment was refused. The price was over fifty dollars. *Held*, in an action to recover the price, that there was no delivery and acceptance of the lumber, within the meaning of the statute of frauds, and that the sale was therefore void.

It seems that to constitute a delivery and acceptance of goods, such as the statute requires, something more than mere words is necessary. Superadded to the language of the contract, there must be some *act* of the parties, amounting to a transfer of the *possession*, and an acceptance thereof by the buyer. The case of cumbrous articles is not an exception to this rule.

On error from the Supreme Court. Houston sued Shindler in the Justices' Court, of the city of Troy, in assumpsit, for the price of a quantity of lumber. The plaintiff having recovered, the defendant appealed to the Mayor's Court of that city, and on the trial in that Court, the case was this:—The plaintiff was the owner of about 2070 feet of curled maple plank and scantling, which he had brought to Troy in a boat, and which, after being inspected and measured, was piled on the dock apart from any other lumber. Soon after this, the plaintiff and defendant met at the place where the

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lumber lay. The plaintiff said to the defendant, "what will you give for the plank?" The defendant said he would give three cents a foot. The plaintiff then asked, "what will you give for the scantling?" The defendant replied, one and a half cents a foot. The plaintiff then said, "the lumber is yours." The defendant then told the plaintiff to get the Inspector's bill of it, and carry it to Mr. House, who would pay it. The next day the plaintiff, having procured the Inspector's bill, presented it to House, who refused to pay it, on the ground that the instructions he had received from the defendant did not correspond with the plaintiff's statement of the contract. There was no note or memorandum of the contract in writing, nor was there any evidence of a delivery or acceptance of the lumber, except as above stated. At the prices agreed on, the lumber came to \$52 51, no part of which was ever paid. The Mayor's Court instructed the jury that if they were satisfied that it was the intention of the parties to consider the lumber delivered at the time of the bargain, and that nothing further was agreed or contemplated to be done, in order to change the title in, or possession of the lumber, the plaintiff was entitled to recover; that the sale was not within the statute of frauds, and did not require any note or memorandum in writing, provided they should find from the evidence, that there was a delivery and acceptance of the lumber at the time of the bargain. The defendant excepted and the jury found a verdict for the plaintiff, on which judgment was rendered in his favor. The Supreme Court, on writ of error to the Mayor's Court, affirmed the judgment, (*See 1 Denio, 48*) and the defendant brings error to this Court.

N. Hill, jr., for plaintiff in error, insisted, that the sale was within the statute of frauds requiring a note in writing. There was no acceptance or receipt of the lumber by the vendee within the intent and meaning of the statute. To take the case out of the statute there must be something more than would be sufficient to change the property at common

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law—something more than would be sufficient to constitute a delivery at common law. There should be, (1) a bargain intended to change the right of property. This is the act of both parties. (2) a delivery of the property and the *actual possession* to the vendee, *discharged of all lien* for the purchase money. This is the act of the seller. (3) An acceptance and receipt of the entire property, and *actual possession* of some part of the goods, as absolute owner, discharged of all lien. These are the acts of the buyer. There was nothing proved in this case but the *bargain*. (3 *Bos. and Puller*, 233; 6 *Barn. and Cress.* 351; *Ch. on Cont.* 389, 390; 3 *Dowl. and Ryl.* 220, 822; 2 *Barn. and Cress.* 87; 3 *Johns.* 399; 10 *Bing.* 101, 376; 5 *Barn. and Cress.* 857, 5; 3 *Barn. and Ald.*, 321, 680; 5 *Do.*, 559; 4 *Mees. and W.*, 155; 1 *Dowl. and Ryl.* 128; 22 *Wend.* 659; 1 *Carr. and Payne*, 272; 3 *Barn. and Cress.* 1; 2 *Carr. and Payne*, 532; 4 *Maule and Sel.* 262; 9 *Barn. and Cress.* 591; 7 *T. Rep.* 15, 17; 1 *C. and M.*, 333; 6 *Wend.*, 400; 11 *Johns.*, 284.)

J. A. Spencer and D. Willard, for defendant in error, cited, *Bates v. Conklin*, 10 *Wend.* 389; *Chaplain v. Rogers*, 1 *East*, 192; *Jewett v. Warren*, 12 *Mass.* 300; 2 *Kent. Comm.* 500, 501, 4th Ed.

GARDINER, J. As no part of the purchase money was paid by the vendee, the contract above stated was void by the statute of Frauds, (2 *R. S.* 136, § 8, *subd.* 3) unless the buyer "accepted and received" the whole or a part of the property sold.

The object of the statute was not only to guard against the dishonesty of parties and the perjury of witnesses, but against the misunderstanding and mistakes of honest men. If the contract is reduced to writing, and "subscribed by the parties to be charged thereby," this object is effectually attained. The writing becomes its own interpreter. Where this is omitted but the vendee has paid part of the price, or the vendor has delivered and the buyer has accepted a portion

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or all of the property, upon the strength of the agreement. These acts not only indicate deliberation and confidence upon the part of the contractors, but they furnished unequivocal evidence of the existence of a contract of some sort between them, although its terms and provisions must after all depend upon the recollection of witnesses.

The case before us is destitute of all such collateral evidence. No acts of the party sought to be charged are proved. We are presented with a naked verbal agreement. The declarations relied upon as evidence, of a delivery and acceptance constitute a *part* of the *contract*, and of course are obnoxious to all the evils and every objection against which it was the policy of the law to provide.

The acts of part payment, of delivery and acceptance mentioned in the statute are something over and beyond the agreement of which they are a part performance, and which they assume as already existing. The entire absence of such evidence distinguishes the present case from all those that have been cited by the counsel for the plaintiff in support of this action. (*Chaplain vs. Rogers*, 1 *East*, 193; *Jewett vs. Warren*, 12 *Mass.* 311; *Riddle vs. Varnum*, 20 *Pick*, 280; 10 *Wend.*, 391; *Kent Com.*, 4th *Ed.* 500, 501.) The strong case, from the Pandects of the Column of Granite is not an exception; for it is fairly to be inferred that the consent of the vendor that the purchaser should take possession was subsequent to the sale.

I am aware that there are cases in which it has been adjudged, that where the articles sold are ponderous, a symbolic or constructive delivery will be equivalent in its legal effect to an actual delivery. The delivery of a key of a warehouse in which goods sold are deposited, furnishes an example of this kind. But to aid the plaintiff, an authority must be shown that a *stipulation in the contract of the sale*, for the delivery of the key or other indicia of possession will constitute a delivery and acceptance within the statute. No such case can be found. The entire contract being void by the statute, the stipulation in reference to a constructive delivery would

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fall with the other provisions. In *Philips vs. Bristol*, (2 B. and C. 511,) the property was sold by an auctioneer and delivered to the purchaser, who after detaining it three or four minutes handed it back saying he was mistaken as to the price. The vendor refused to receive the property, and the jury found that the excuse was false in fact. The verdict was set aside: The Court saying that to satisfy the statute there must be a delivery by the vendor, with an intention of vesting the right of possession in the vendee, and there must be an actual acceptance by the latter with the intent of taking possession as owner.

This, I apprehend, is the correct rule and it is obvious, that it can only be satisfied by something done subsequent to the sale unequivocally indicating the mutual intentions of the parties. Mere words are not sufficient. (8 *Johns.* 421.) Declarations accompanying an act and explanatory of it are undoubtedly admissible evidence, as a part of the *res gestae*. This is all that is established by the modern authorities. (12 *Mass.*, 301; 1 *Dallas*, 171; 2 *Barn. and Cress.* 44; 3 *J. R.* 421).

In a word the statute of fraudulent conveyances and contracts, pronounced this agreement when made, void, unless the buyer should "accept and receive some part of the goods."

The language is unequivocal and demands the action of both parties, for acceptance implies delivery, and there can be no complete delivery without acceptance. The defendant, however, said nothing and did nothing subsequent to the agreement except through his agent to repudiate the contract. There was consequently no evidence of a delivery.

I think, therefore, the learned Recorder erred in submitting that question to the jury, and that the judgment of the Supreme Court should be reversed.

The Statute of Frauds has been pronounced by high authority, (*Kent's Comm.* 2 V., 494) to be, in many respects, the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights. Its benefits it is believed will be most effectually secured, by

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rejecting refined distinctions, overlooking the supposed equity of particular cases, and adhering steadily to its language as the best exponent of the intention of the Legislature.

BRONSON, J. On a review, and a more full consideration of the case, I am satisfied that I was in an error in assenting to the judgment which was rendered by the Supreme Court. If we assume that the sale was in all other respects complete, the difficulty still remains that there was no delivery of the goods. Nothing was done. As was very justly remarked by the defendant's counsel, there was nothing but mere *words*; and the statute plainly requires something more; it calls for *acts*. (*Per Cowen, J., in Archer vs. Zeh, 5 Hill 205.*) A writing must be made, part of the purchase money must be paid, or the buyer must accept and receive part of the goods. Mere words of contract, unaccompanied by any act, cannot amount to a delivery. To hold otherwise would be repealing the statute.

There may be a delivery without handling the property, or changing its position. But that is only where the seller does an act by which he relinquishes his dominion over the property, and puts it in the power of the buyer; as by delivering the key of the warehouse in which the goods are deposited, or directing a bailee of the goods to deliver them to the buyer, with the assent of the bailee to hold the property for the new owner. In such case there is, in addition to the words of bargain, an act by which the dominion over the goods is transferred from the seller to the buyer. Here there was no delivery either actual or symbolical.

I shall not review the cases on this subject further than to notice those supposed to favor the plaintiff. In *Chaplin vs. Rogers*, (1 *East*. 192,) the buyer had re-sold the property, and his vendee had carried it away. The Court held that there was sufficient evidence to carry the cause to the jury on the question of delivery to and acceptance by the first purchaser. *Bates vs Conkling*, (10 *Wend.* 389,) was a writ of error, and the question of delivery did not arise, because, as the Chief

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Justice remarked, the point was not made in the Court below, where it might have been obviated by testimony. It was also suggested at the bar, in answer to this case, that the question arose upon a contract for work and labor, rather than a contract of sale. But it would be difficult to maintain that doctrine. (*Downs vs. Ross*, 23 *Wend.* 270.) It is enough, however, that what was said in *Bates vs. Conkling*, about the delivery of cumbersome articles, was but a *dictum*, and not upon the point in judgment. In *Jewett vs. Warren*, (12 *Mass.* 300,) where logs in a boom were sold, there was a bill of parcels; and no question upon the statute of frauds either was or could be made. The question was, whether there had been a sufficient delivery to constitute the logs a valid pledge. We have not been referred to any modern case, nor have I met with any which will uphold this judgment.

It is undoubtedly true, that it will not always be easy to make an actual delivery of bulky and ponderous articles. But there are other ways of satisfying the statute of frauds. The parties may put their agreement in writing, or the buyer may pay the whole or some part of the purchase money. M

I am of opinion that the judgments of the Supreme Court and the Mayor's Court should be reversed, and a *venire de novo* be awarded.

WRIGHT, J. There being no note or memorandum made in writing, of the contract or earnest paid, this is a case within the statute of frauds, unless there was an acceptance and receipt of the whole or a part of the property by the buyer. (2 *R. S.* 136, § 3.) If there was an acceptance shewn sufficient to take the case out of the operation of the statute, it was of all the lumber, as it is not pretended that the entire property vested in the vendee by the acceptance and receipt of a part thereof. The question, therefore, for consideration upon the facts proved, is whether there was an acceptance and receipt of the lumber by Shindler, the vendee, within the intent and meaning of the statute.

It is to be regretted that the plain meaning of the statute

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should ever have been departed from, and that any thing short of an actual delivery and acceptance should have been regarded as satisfying its requirements, when the memorandum was omitted; but another rule of interpretation which admits of a constructive or symbolical delivery has become too firmly established now to be shaken. The uniform doctrine of the cases, however, has been, that in order to satisfy the statute there must be something more than mere words—that the act of accepting and receiving required to dispense with a note in writing, implies more than a simple act of the mind, unless the decision in *Elmore vs. Stone* (1 Taunton, 458) is an exception. This case, however, will be found upon examination to be in accordance with other cases, although the acts and circumstances relied upon to shew a delivery and acceptance, were extremely slight and equivocal; and hence the case was doubted in *Howe vs. Palmer*, (3 Barn. and Ald. 324) and *Proctor vs. Jones*, (2 Carr. and Payne, 534) and has been virtually overruled by subsequent decisions. Far as the doctrine of constructive delivery has been sometimes carried, I have been unable to find any case, that comes up to dispensing with all acts of parties, and rests wholly upon the memory of witnesses as to the *precise form of words* to shew a delivery and receipt of the goods. The learned author of the Commentaries on American Law, cites from the Pandects the doctrine that the consent of the party upon the spot is sufficient possession of a column of granite, which by its weight and magnitude, was not susceptible of any other delivery. But so far as this citation may be in opposition to the general current of decisions in the Common Law Courts of England and of this country, it is sufficient perhaps to observe that the Roman law has nothing in it analogous to our statute of frauds. In *Elmore vs. Stone*, expense was incurred by direction of the buyer, and the vendor, at his suggestion, removed the horses out of his sale stable into another, and kept them at livery for him. In *Chaplin vs. Rogers* (1 East 192) to which we were referred on the argument, the buyer sold part of the hay, which the purchaser had taken away; thus dealing with it as if it were

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in his actual possession. In the case of *Jewett vs. Warren* (12 *Mass. R.* 300) to which we were also referred, no question of delivery under the statute of frauds arose. The sale was not an absolute one, but a pledge of the property. The cases of *Elmore vs. Stone* and *Chaplin vs. Rogers* are the most barren of acts indicating delivery, but these are not authority for the doctrine that words, *unaccompanied by acts* of the parties, are sufficient to satisfy the statute. Indeed, if any case could be shown which proceeds to that extent, and this Court should be inclined to follow it, for all beneficial purposes, the law might as well be stricken from our statute book; for it was this species of evidence, so vague and unsatisfactory, and so fruitful of frauds and perjuries, that the Legislature aimed to repudiate. So far as I have been able to look into the numerous cases that have arisen under the statute, the controlling principle to be deduced from them is, that when the memorandum is dispensed with, the statute is not satisfied with any thing but unequivocal acts of the parties; not mere words that are liable to be misunderstood and misconstrued, and dwell only in the imperfect memory of witnesses. The question has been, not whether the words used were sufficiently strong to express the intent of the parties, but whether the acts connected with them, both of seller and buyer, were equivocal or unequivocal. The best considered cases hold that there must be a vesting of the possession of the goods in the vendee, as absolute owner, discharged of all lien for the price on the part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so unequivocal that he shall have precluded himself from taking any objection to the quantum or quality of the goods sold. (*Chitty on Contracts* 390, and cases cited; *Hilliard, on Sales* 135, and cases cited; 10 *Bing.* 102, 384.) But will proof of words alone shew a delivery and acceptance from which consequences like these may be reasonably inferred? Especially, if those words relate not to the question of delivery and acceptance, but to the contract itself? A. and B. verbally contract for the sale of chattels, for ready money; and with-

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out the payment of any part thereof, A. says "I deliver the property to you," or "It is yours," but there are no acts shewing a change of possession, or from which the fact may be inferred. B. refuses payment. Is the right of the vendor to retain possession as a lien for the price gone? Or, in the event of a subsequent discovery of a defect in the quantum or quality of the goods, has B. in the absence of all acts on his part shewing an ultimate acceptance of the possession concluded himself from taking any objection? I think not. As Justice Cowen remarks in the case of *Archer vs. Zeh* (5 *Hill*, 205). "One object of the statute was to prevent perjury. The method taken was to have something done; not to rest every thing on mere oral agreement." The acts of the parties must be of such a character as to unequivocally place the property within the power, and under the exclusive dominion of the buyer. This is the doctrine of those cases that have carried the principle of constructive delivery to the utmost limit. Thus, in *Searles vs. Keeves* (2 *Esp. R.* 598) a case which arose at a period when the English Courts were more inclined than recently to allow of a constructive delivery and acceptance, where a written order was given by the seller of goods to the buyer, directing the person in whose care the goods were to deliver them, which order was presented by the buyer, it was held that there was a sufficient delivery within the statute. So, also, in *Hollingsworth vs. Napier* (3 *Caines R.* 182) where the vendor delivered to his vendee a bill of parcels for goods lying in a public store, together with an order on the store keeper for their delivery, and the vendee, upon delivering the order demanded the goods, which were turned out to him, and he paid the amount of the storage, marked the bales with his initials, and returned them to the custody of the store keeper, it was held that the statute was satisfied. But in cases like these, it would seem now to be necessary, that the party having the custody of the goods, and who is the agent of the vendor, should recognize the order given to the purchaser, and assent to retain the goods for him. A delivery to the vendee of the key of the warehouse in which the

goods are lodged, or other *indicia* of property, where goods are ponderous and incapable of being handed over from one to another, was said by Lord Kenyon, in *Chaplin vs. Rogers* (1 *East* 194) to be tantamount to an actual delivery. In *Dodsley vs. Varley* (12 *Adol. & Ellis*, 682) which was an action of assumpsit for wool bargained and sold, the Court said, "We think that upon the evidence, the place to which the wool was removed may be considered as the defendant's warehouse, and that he was in *actual possession* of it as soon as it was weighed and packed." In these cases, and in a large number of others that might be cited, the circumstances were unequivocal to shew, not merely a delivery to and acceptance of the *property* in the goods, but, what is always essential, a complete acceptance of the *possession*, by the buyer. The facts were more or less strong in the several cases, but the acts of the parties can scarcely be reconciled with any other presumption.

On the other hand, where the acts of the buyer are equivocal, and do not lead irresistibly to the conclusion that there has been a transfer and acceptance of the possession, the cases qualify the inference to be drawn from them, and hold the contract to be within the statute. In *Baldy vs. Parker*, (2 *B. and C.* 37) A. purchased of B., a trader, several articles, amounting in the whole to £70. A. marked with a pencil some of the articles, saw others marked, and helped to cut off others. He then requested that a bill of the goods might be sent to him, which was done, together with the goods, but he declined to accept them. It was held that there was no delivery and acceptance to take the case out of the statute; and Lord C. J. Abbott, in speaking of the exception in the statute, justly remarked that, "It would be difficult to find words more distinctly denoting an actual transfer of the article from the seller, and an actual-taking possession of it by the buyer." In *Carter vs. Touissant*, (5 *B. and Ald.* 855,) the circumstances were, that a horse was sold by verbal contract, but no time fixed for the payment of the price. The horse was to remain with the vendor for twenty days, without charge to the

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vendee. At the expiration of that time he was sent to grass by order of the vendee, and entered as one of the vendor's horses. The Court held that there was no acceptance of the horse by the vendee within the meaning of the statute. In *Tempest vs. Fitzgerald*, (3 *Barn. and Ald.* 680,) A. agreed to purchase a horse from B. for cash, and take him away within a certain time. About the expiration of that time A rode the horse, and gave directions as to his treatment, &c., but requested that he might remain in the possession of B for a further time, at the expiration of which time he promised to take and pay for the horse, to which B. assented. The horse died before A. paid the price or took it away. It was held that there was no sufficient acceptance of the horse to render the vendee liable for the price. In *Howe vs. Palmer*, (3 *B. and Al.* 321,) a vendee publicly agreed at a public market, with the agent of the vendor, to purchase twelve bushels of tares, (then in the vendor's possession constituting part of a larger quantity in bulk,) to remain in the vendor's possession until called for. The agent, on his return home, measured and set apart the twelve bushels. It was held that in this case there had been no acceptance, and the action would not lie. In *Kent vs. Huskisson*, (3 *B. and P.* 283,) A. verbally ordered from B. a bale of sponge, which was sent. The bale was opened and examined, and the sponge returned by B., who at the same time wrote a letter to A., stating that he disapproved thereof. It was held that B. had not accepted the goods. In *Proctor vs. Jones*, (2 *Car. and P.* 532,) it was said that the marking of casks of wine, sold by parol, and lying at the London docks, with the initials of the purchaser, at his request and in his presence, was not a sufficient acceptance within the statute, at least if the time of payment had not, when the casks were so marked, been fixed. In *Bailey vs. Ogden*, (3 *John R.* 399,) an agreement with the vendor, on a parol contract for the sale of goods, about the storage of the goods, and the delivery by him of the *export entry* to the agent of the vendor, were held not to be sufficiently certain to amount to a constructive delivery, or to afford an *indicium* of ownership. Other com-

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paratively recent English and American cases might be cited shewing, as has been said by Mr. Justice Coleridge, that "the tenor of modern decisions is to give to the words of the statute their fullest effect, and not to allow (so far as it is possible) of any constructive deliveries and acceptances."

I think I may affirm with safety that the doctrine is now clearly settled, that there must not only be a delivery by the seller, but an ultimate acceptance of the possession of the goods by the buyer, and that this delivery and acceptance can only be evinced by unequivocal acts independent of the proof of the contract. But if the principles to be deduced from the recent decisions were otherwise, I should not be disposed, in the face of the plain and obvious meaning of the statute, to follow them. The statute of frauds of 29 Car. 2, (and it is in substance re-enacted in this State,) was justly pronounced, nearly half a century since, by an eminent British Judge, "one of the wisest laws in the statute book." Its provisions apply with singular wisdom and beneficence, "to the daily contracts and practical affairs of mankind," relieving them of vagueness and uncertainty, and checking, to some extent, "the restless and reckless spirit of litigation." Whilst this meritorious law is in the statute book, it is our business to enforce it in good faith, and according to its plain letter and spirit, without studying to fritter away its vitality in the attempt to uphold contracts which by its provisions are clearly void.

I am of the opinion that the judgment of the Supreme Court should be reversed.

RUGGLES, JONES, and JOHNSON, Js., concurred.

JEWETT, CH. J., and GRAY, J., delivered opinions in favor of affirming the judgment.

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VILAS & BACON, Appellants, vs. JONES & PIERCY, Respondents.

The complainants were sureties for C. upon a note given to J. for a usurious loan of money. An action at law was brought upon the note against the complainants, and C. in the name of P., as endorsee. The complainants pleaded the general issue, and gave notice of the defence of usury, but did not verify the notice as required by the usury act of 1837, so as to entitle them to examine the plaintiff as a witness. On the trial, they called as a witness, J., the payee of the note, who stated, on his *voir dire*, that he was the owner of the note and the plaintiff in interest, and objected to testifying in the cause, and his objection was sustained by the Court. A verdict was taken for the amount equitably due on the note, and judgment was perfected against the complainants and C.; *held*, that a bill filed by the complainants, *after judgment at law*, for the purpose of obtaining the testimony of C., and for relief against the judgment on the ground of usury, could not be sustained.

Held further, that after judgment at law, the bill could not be sustained on the ground that the complainants, as sureties, were discharged by reason of the holder of the note having extended the time of payment to the principal debtor in consideration of a usurious premium paid by him in advance, it not being shewn that the complainants were prevented from setting up this defence in the action at law, by any fraud or accident, or by the act of the opposite party.

And per BRANSON, J. and JEWETT, C. J., an agreement made by a creditor with the principal debtor, to forbear the payment of the debt in consideration of a usurious premium paid for such forbearance, is void, and therefore cannot operate to discharge the sureties.

Whether a mere surety is a borrower, within the meaning of the usury act of 1837 (*Laws of 1837, p. 487, § 4*), *quere*.

Appeal from Chancery. The appellants, complainants in the Court below, filed their bill in the Court of Chancery against the respondents, in which the case was stated in substance as follows: In April, 1839, Harvey Church borrowed of the defendant, Jones, \$200 for six months, and was to pay for the use thereof at the rate of ten per cent. per annum. Church and the complainants, as his sureties, thereupon gave their joint and several note to Jones, at six months, for \$210, being the sum loaned and the interest added thereto, including three per cent. for the usurious premium. At the end of the six months it was agreed, between Church and Jones, that the debt should be forborne for six months longer at the same rate of interest, which was then paid in advance by Church. One

or more other agreements to extend the time of payment were made at the same usurious rate of interest, which was also paid in advance. The bill insisted that the note was void for usury, also that the complainants, as sureties, were discharged from liability by reason of the time of payment being extended to Church, the principal in the manner above stated. In April, 1842, a suit at law was commenced on the note against Church and the complainants, in the name of the defendant, Piercy, as endorsee of the note. The complainants pleaded to the suit the general issue, and gave notice of their defences above mentioned; but it did not appear that the notice was verified by affidavit. The suit was brought to trial in May, 1842, and the complainants procured said Jones to attend as a witness, expecting, as the bill averred, to prove the facts above stated by him. But Jones, on being sworn as a witness, stated on his *voire dire*, that he was the owner of the note, and that the suit was brought for his benefit, and he thereupon objected to testifying in the cause. The Court sustained his objection. *Previous to the trial of the cause*, Jones had been applied to by the counsel of the complainants, to learn who was the owner of the note, and Jones stated that he had sold the note to Piercy, and that Piercy was the owner. The bill however did not shew that this false information was the reason why the complainants did not verify the notice annexed to their plea, so as to enable them to call Jones as a witness to prove the usury, under the act of 1837, or that they had been in any wise misled thereby.

The bill also alleged, that the facts on which the defence in the suit at law rested, were known only to Church and to Jones; that Church, being a co-defendant in the suit, and Jones, being excused from testifying as above stated, the complainants were unable to establish their defence, and a verdict was taken against them for \$197,34, the amount claimed to be due on the note, for which amount and costs of suit, judgment was perfected against them and Church; that Church suffered judgment by default, and that he also refused to join in the bill of complaint; that said Church had instituted pro-

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ceedings to be discharged as a bankrupt under the act of Congress, passed August 19, 1841; that he was duly declared a bankrupt on the 16th of May, 1842, and (as the complainants were informed and believed) that he would be entitled to his discharge, and would receive the same before an order to take proofs could be entered in this cause, so that the complainants could have the benefit of his testimony to establish the matters of defence above set forth. The bill also alleged that the complainants had released Church from all liability over to them, in consequence of their signing the note as his sureties. The prayer of the bill was for relief against the judgment by injunction to restrain execution and all other proceedings for the collection of the same from the complainants, for answer without oath, &c.

The respondents severally demurred to the bill for want of equity. The cause was referred for hearing to the Assistant Vice Chancellor of the First Circuit, who allowed the demurrers, and dismissed the bill. The Chancellor on appeal affirmed the order.

S. Stevens, for appellants. The complainants are entitled to relief on the ground of usury. They are to be deemed borrowers within the equity of the act of 1837, so far as regards the remedy given by that act. (*Laws of 1837*, p. 487; *Perine et. al. vs. Striker*, 7 *Paige* 598.) This defence was not available in the suit at law. Church, being a co-defendant in that suit, could not be examined as a witness. Jones, the payee of the note, the only other person to whom the facts were known, declined to testify, and his objection was sustained by the Court. (*Cook vs. Spaulding*, 1 *Hill* 586.) This presents a case upon which a Court of Equity will relieve after judgment. (*Norton vs. Woods*, 5 *Paige* 249; *Morse vs. Hovey*, 1 *Barbour Ch. Rep.* 404.)

Church was not a necessary party to the bill. After suffering judgment at law, by default he could have no claim to relief in equity; nor could any decree to be pronounced in this

cause affect him in any way. (*Story Eq. Pl.* §§ 231, 443, 445.)

The extension of the time of payment given by Jones, the creditor, to Church the principal debtor, without the consent of the complainants, who were mere sureties, discharged them. This defence is personal to themselves, and entitles them to the relief prayed by the bill. (*Rathbone vs. Warren*, 10 *Johns.* 587; *King vs. Baldwin*, 17 *do.* 384; *Miller vs. McCan*, 7 *Paige* 451; *Burge on Suretyship*, 197, 211.)

James Edwards, for the respondents.

I. The appellants having suffered judgment at law to pass against them on a trial upon matters which, if proved, constituted a defence at law, and of which they were fully cognizant before the trial, cannot be relieved from such judgment in equity. (*Simpson vs. Hart*, 4 *Johns. Ch. R.* 91; *Gelston & Schenck vs. Hoyt*, 1 *Johns. Ch. R.* 543; *Barker vs. Elkins & Simpson*, 1 *Johns. Ch. R.* 465; *Norton vs. Woods*, 5 *Paige* 249; *Bates vs. Bagley*, 1 *Breese's R.* 60; *Cown vs. Price*, 1 *Bibb's R.* 173; *Penny vs. Martin*, 4 *Johns. Ch. R.* 566; *Northrup and al. vs. Survivor of Lane and al.* 3d *Dessaure's Repts.* 324; *Bateman vs. Wilson*, 1 *Sch. and Lefroy R.* 201-4; *Williams vs. Lee*, 3d *Atkins' R.* 223; *Green vs. Dodge and al.* 6 *Hammond R.* 80; *Thompson vs. Berry*, and *al.* 3d *J. Ch. R.* 395; *Thompson vs. Berry*, 17 *J. R.* 446, *on appeal*; *Duncan vs. Lyon*, 3 *J. Ch. R.* 351; *Campbell vs. Morrison*, 7 *Paige R.* 157; *McVicker vs. Woolcott*, 4 *J. R.* 510; *Cowen and Hill's Notes*, 949, 950.)

II. The appellants coming into this Court to set up a defence which they might have interposed at law, must do equity before asking it, and as the verdict was for no more than the original loan with the lawful interest on it, after deducting the payments, equity will not relieve them therefrom on the ground of usury.

III. If the Court erred in excusing Jones from testifying, the remedy was by a bill of exceptions, and not by a bill in

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equity: (*Henry and Pierce vs. The Bank of Salina*, 5 Hill 523; *Stevens vs. White*, 5 Hill 548.)

BRONSON, J. Harvey Church as principal, and the complainants as his sureties, made their joint and several promissory note for two hundred and ten dollars, payable to Jones, who endorsed it to Piercy. After Piercy had sued and recovered judgment on the note at law, against all of the makers, the complainants filed their bill in the Court of Chancery to be relieved against the judgment, on the ground that the note was void for usury; but they neither paid nor offered to pay the money actually loaned, nor the legal interest thereon. Unless the case has been provided for by our recent usury statutes, it is entirely clear that such a bill cannot be maintained. It is a fundamental principle of the Court of Chancery that he who asks equity must do equity; and without an express command of the Legislature, the Court of Chancery never does so unjust a thing as to entertain a bill to annul a contract on the ground of usury, without requiring the debtor to do equity on his part. He must return, or offer to return, what he actually received, with interest. The principle is a familiar one, and I need not cite authorities to support it.

Before examining the statute it is proper to notice, that the bill states, in express terms, that the agreement for the loan which the note was given to secure, was made between Jones and Church; and that the loan was actually made by Jones to Church. And it is not stated that the complainants had any thing to do either with the agreement or the loan. They only became sureties for the re-payment of the money.

Let us now see what the Legislature has done. It has set aside the rule of equity which has been mentioned, in favor of the "borrower" of the money, but not in favor of any one else: (1 R. S. 772, § 8, *Stat.* 1837, p. 487, § 4.) It will only be necessary to notice the last act, as that goes further than any usury law which preceded it. The 4th section is as follows: "Whenever any *borrower* of money, goods, or things in action, shall file a bill in Chancery for relief or discovery,

or both, against any violation 'of the usury laws,' it shall not be necessary for *him* to pay, or offer to pay, any interest or principal on the sum or thing loaned." The word "borrower" is again used near the close of the section, without anything to enlarge its ordinary signification. There is, I think, no established rule of interpretation which will so enlarge this provision as to make it include the sureties of the borrower. It cannot be carried so far without indulging a latitude of construction which would amount to a new enactment. I am aware that the Chancellor and the late Mr. Justice Sutherland, have respectively intimated an opinion that the surety is a borrower within the meaning of the statute. (*Perrine vs. Striker*, 7 Paige 602; *Livingston vs. Harris*, 11 Wend. 336.) But the point was not decided in either case. Both turned upon other grounds; and in the case before the Chancellor, the bill was filed by the borrower in conjunction with the surety. It may be true, as was remarked by Mr. Justice Sutherland, that there is no reason, *in the nature of the case*, why the surety should not have all the remedies and means of defence which are given to the principal debtor. But that does not settle the point. The question still remains, whether the Legislature has given the same remedies and means of defence to both. I think not. The agreement to borrow, and the security for the loan, are two things, and the borrower and his surety are two persons. The Legislature has given a new and peculiar remedy to one, and only one, of those two persons; and I see no principle upon which the Courts can so extend the enactment as to make it include both. It is quite possible that the Legislature, in its zeal to regulate this branch of trade, and make money cheap when it is scarce, as well as when it is plenty, would have given this new remedy to the surety as well as the borrower, if the thing had been thought of. But if it is a *casus omissus* in the statute, it is for the Legislature, and not the Courts, to supply the defect. (*Jones vs. Smart*, 1 T. R. 52.) To bring a case within the statute, it must not only be within the mischief contemplated by the Legislature, but also within the fair import of the words which

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the Legislature has used. (*Brandling vs. Barrington*, 6 T. R. 469; *Dwar. Stat.* 711.) I had occasion to remark, in *Waller vs. Harris*, (20 Wend. 561,) that the current of authority at the present day was in favor of reading statutes according to the natural and most obvious import of their language, without resorting to subtle or forced constructions for the purpose of either limiting or extending their operation. If we read the statute under consideration, in that way, indeed, if we do not take a most unwarrantable license with the language which the Legislature has used, the word "borrower" cannot be made to include the borrower, and his surety also. It is true that a majority of the Court of Errors gave a pretty large construction to the word "plaintiff," in another section of this statute. (*Henry vs. Bank of Salina*, 5 Hill 523.) But there was some color for that decision; while, in my judgment, there is no solid ground for saying, that the word "borrower" includes one who did not borrow, and who had no other connection with the transaction than that of becoming a surety for the man who did borrow.

I have thus far considered the case as though the statute was remedial only, and ought therefore to have a liberal construction. But if the statute is remedial, it is also penal. It not only creates a forfeiture of the debt, but it punishes the lender as a criminal. The very section under consideration was made for the purpose of bringing about a forfeiture of the money actually loaned. All the books agree that penal statutes are to be construed strictly; and I am not aware of any principle upon which such a usury law as we have can be made an exception to the general rule. There is, however, no occasion for applying a strict construction in this case.

The conclusion from what has been said may be stated in few words. Church, who borrowed the money refused to join with the complainants in filing the bill; and he is not a party to it in any form. As the bill was not filed by the "borrower," the case does not come within the provision of the statute which relieves him from the necessity of paying, or offering to pay, the money actually loaned. The complainants are enti-

tled to no such favor, because the statute does not give it to them; and when they go into Chancery they are met by that cardinal principle of the Court, that he who asks equity must do equity; and as they had not paid, nor offered to repay the the money loaned, with interest, the bill was properly dismissed, so far as relates to the question of usury.

2. There is a further reason why this case does not come within the statute, and a reason which would exist though Church had joined with the complainants in filing the bill. This statute, like all other laws which provide a remedy or defence, must be understood as applying only to a remedy or defence which is set up or pursued before the matter has passed into judgment. It would be strange indeed if a party could wait till after judgment, and then insist on a remedy or defence which might have been available had it been put forward at the proper time. When, therefore, the borrower does not move until after a judgment against him at law, if he can then go into Chancery at all, he cannot do it as a matter of right under this statute, but only as a matter of equity under the general powers of the Court: and when he cannot come with the statute in his hands, the answer of the Court is, you must do equity, or offer to do it, before you can be heard.

There are then two reasons why this case does not come within the statute: (1.) the bill was not filed by the borrower of the money; and (2.) it was not filed until after a judgment had been recovered on the note. And as the statute must be laid out of view, the bill was properly dismissed, because the complainants did not offer to return the money actually loaned, with interest.

II. There is a further difficulty in the way of the complainants: they have appealed to Chancery after a trial and judgment against them at law; and the bill shows no sufficient ground for granting relief. I am still speaking of that branch of the case which rests upon the charge of usury.

When a party goes into Chancery after a trial at law, he must be able to impeach the justice and equity of the verdict; and it must be upon grounds which either could not be made

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available to him at law, or which he was prevented from setting up by fraud, accident, or the wrongful act of the other party, without any negligence or other fault on his part. The cases were cited at the bar and I need not repeat them.

The defence was available at law ; and the only difficulty which the complainants met with there was, the inability to prove it. The bill states in substance, that Jones was the only witness, and the complainants expected to prove the usury by him. Prior to the trial their counsel applied to Jones to learn who was the owner of the note ; and he answered, that he had sold the note to Piercy, the plaintiff on record in that suit, and he was the owner of it. On the trial, the complainants called Jones, and he testified, that he owned the note ; that the suit was brought for his benefit, and Piercy had no interest in it. The Judge therefore decided that Jones could not be required to testify, without his consent.

To the case thus made by the bill, there are several decisive answers.

1. If Jones told a falsehood in relation to the ownership of the note previous to the trial, there is no allegation in the bill that the complainants were deceived or in any way misled by it, or that they omitted to do anything which would have been done had Jones spoke the truth. There is no charge or statement in the bill that the declaration of Jones had any influence whatever upon their conduct, or that it contributed in any degree to the defeat which they suffered in making out the defence. We cannot see, from the nature of the case, that the complainants must have been injured by the falsehood ; and as they have made no such charge, we cannot presume that they were injured. It would be a new and most dangerous precedent, to allow a party to go into Chancery for a new trial because his adversary had told a falsehood, without showing, or even alleging, that the falsehood had led to the defeat in the trial at law, or been in any degree instrumental in bringing about that result.

2. It may be inferred from the bill, and such also is the suggestion of the counsel, that Jones was excused from swear-

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ing to the usury, on the ground that he was the plaintiff in interest, and not being the plaintiff on record, he could not be compelled to answer under the 2d section of the usury act of 1837. That was an erroneous ruling of the Judge, according to the decision of the Court of Errors in *Henry v. Bank of Salina*, (5 Hill, 523;) and the remedy of the complainants was a bill of exceptions. This is probably the first case on record where a party who has been defeated by an erroneous decision at law, has resorted to a bill in equity, instead of a bill of exceptions, to correct the error. But if it is not the first, I trust it will be the last case where such an experiment will be tried.

In *Perrine v. Striker*, (7 Paige, 598,) the Chancellor dismissed a bill filed by the borrower and his surety, on the ground that they had an adequate remedy at law, by examining the plaintiff to prove the usury, under the second section of the act of '37. The bill was filed before there had been a trial at law, and in pursuance of the express words of the 4th section of the same statute. If it was proper to dismiss the bill in such a case on the ground that there was an adequate remedy at law, no one can doubt that it was proper to dismiss this bill for the same reason.

3. The Court of Chancery will not aid a party after he has had a trial at law, unless he impeach the justice and equity of the verdict. Now in this case, instead of taking a verdict for the amount of the note with interest, which at the time of the trial was about \$245, the plaintiffs took a verdict for only \$197,34: and it was stated on the argument by the defendant's counsel, and admitted by the counsel for the complainants, that this was no more than the sum actually loaned with legal interest, after deducting all payments, according to the statement of those matters made in the bill. This then is a just and equitable verdict; and yet the complainants have gone into Chancery to get rid of it, and bring about a forfeiture of the whole debt. No precedent for such a bill was mentioned at the bar, and I presume none can be found.

III. Another objection to the bill is the want of proper

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parties. Church and the complainants were joint makers of the note, and they were all sued together. The defence of usury is common alike to all: it is as good a defence for Church, as it is for the complainants; and yet Church has not been made a party to the bill. The whole controversy cannot be settled in this suit; for another bill may be filed by Church, and the defendants be thus subjected to a double litigation. True, the complainants say, that Church suffered judgment to pass against him by default; and that he refused to put in a plea, or to join with the complainants in filing this bill. But Church has a right to speak for himself; and until he has been heard, either as complainant or defendant, he cannot be concluded by this litigation. In *Miller vs. McCan* (7 Paige 457,) where the surety was allowed to maintain a bill against the creditor, without making the principal debtor a party, the equity on which the bill was founded was peculiar to the surety, and such as could not under any circumstances be made available to the principal debtor. It is not so here; and the non-joinder of Church is a fatal objection. *Briggs vs. Butler* (9 Paige 226,) reversing the decree of the V. C. of the 8th Circuit, (*Clarke V. C. Rep.* 517,) is a case in point.

I have now done with that branch of the case in which the complainants ask relief on the ground that the note was void for usury.

Second. The complainants set up as another ground of defence to the note, that they were sureties for Church; and that after the debt became due, Jones, without their knowledge or consent, gave further day of payment to the principal debtor.

1. The first answer to this branch of the case is, that the complainants have tried or had the opportunity of trying, that matter at law, where it is as good a defence as it is in equity; and no sufficient reason is shewn for a subsequent appeal to the Court of Chancery. A portion of what has been said on the same subject in relation to the other branch of the case, is equally applicable here, and need not, therefore, be repeated.

But there is something to be added. It appears from the bill, that the complainants were apprised of the facts before they pleaded at law, and gave notice of this defence with the general issue; and further, that they went to trial with the knowledge that no one could prove the defence but Jones or Church. As Church was a party to the record, the complainants knew that he could not be sworn. They say in the bill, that they "expected" to establish the fact of giving time by the testimony of Jones. That is a falsehood in point of law, if it be not also a falsehood in point of fact. Jones could be called in only one of two characters—either under the usury act, as plaintiff in interest, (*Henry v. Bank of Salina*, 5 Hill, 523,) or simply as a witness. He could only be called as the plaintiff in interest, "for the purpose of proving the usury;" (*Stat.* '37, p. 487, § 2,) and not for any other purpose whatever. (*Bank of Salina v. Henry*, 2 Denio 155, affirmed 1 Comst. See ante 83.) He could not be called as plaintiff, for the purpose of making out the defence of which we are now speaking.

Let us now suppose him called as a witness merely, having no interest in the event of the suit. According to the statements in the bill, the facts to be proved by him to make out this branch of the case were, that he had on several occasions charged and received usury for forbearing and giving further day of payment on the note. He must then have been called to prove facts which would show him guilty of a misdemeanor punishable with fine and imprisonment; (*Stat.* 1837, p. 487, § 6,) and of course he was not obliged to answer. So far as relates to this branch of the case, the objection which he made to giving evidence, was properly allowed by the Court. Now if we assume in favor of the complainants, what is not alleged in the bill, that they were misled by the falsehood imputed to Jones, and acted upon the assumption that he had no interest in the suit, and might therefore be called like any other witness, the complainants must still fail in this branch of their case; for they either knew, or were bound to know, that Jones could not be compelled to testify to the facts which they proposed to prove by him. This disposes of every shadow of ex-

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cause set up in the bill for resorting to Chancery for a new trial, after having had a trial at law.

2. There is another answer to this branch of the case which I deem entirely conclusive. Merely giving further time of payment to the principal debtor, without the consent of the surety, is no defence for the latter; time must be given in pursuance of a valid contract for that purpose, which ties the hands of the creditor, so that he cannot sue if he would. If the agreement be not under seal, it must, like other contracts by parol, appear to be founded upon a sufficient legal consideration. In this case the original note was never given up; Jones kept it in his hands, and might have brought a suit upon it at any time after it fell due, unless he was restrained by some binding agreement. Now each and every extension of time mentioned in the bill was made upon an usurious contract, such as is expressly declared to be void by statute. In every instance Church agreed to pay more than the legal rate of interest for the forbearance; and in most of the cases, the payment was actually made. It has not been suggested that a promise to pay usury in future, an engagement that is utterly void, can be regarded as any consideration whatever for a promise by the creditor to extend the time of payment. And undoubtedly he may sue the next moment. And I am wholly unable to see how usury, paid down, can make the case any better. The contract for usury is equally void whether the money is actually paid or only promised to be paid at a future day. The statute has made no distinction; but on the contrary, has declared void *all* contracts infected with usury. Though the debtor parts with the money, it still belongs to him; and he may sue the next moment and recover it back. (1 R. S. 772, § 3.) This shows that there is no force in the suggestion, that although the creditor cannot legally receive, the debtor is not forbidden by law to give money at a usurious rate for the forbearance. Although the statute does not in terms say that the debtor shall not give what he pleases for the forbearance, it does so in legal effect; he is put into the same category with infants, femes covert, and persons *non compos mentis*,

and declared legally incompetent to make a bargain about money where more than seven per cent. is demanded. If he agrees to give more, the agreement is void: and though the agreement be executed by paying the money, it is still void, and the money may be re-called at pleasure. I think it impossible to maintain that either the promise or the payment of usury is a good consideration for a promise by the creditor to give time. It is no consideration at all. The creditor gets no benefit, and the debtor suffers no damage.

This question was not decided in *Miller vs. McCan*, (7 Paige 451,) for there is nothing to show that it was so much as thought of, either by Court or counsel. I believe the word usury is not even mentioned in the case.

After proceeding thus far, two cases in the Kentucky Court of Appeals, touching this question, have fallen under my observation. (*Tudor vs. Goodhue*, 1 B. Monroe L. and Eq. Rep. 322; *Kenningham vs. Bedford*, *id.* 325.) In the first of those cases it was held, that an agreement by the creditor to extend the time for payment, on a promise by the principal debtor to pay an usurious rate of interest for the forbearance, did not discharge the surety, for the reason that as the promise of the debtor to pay usury was void, there was no consideration for the promise of the creditor to forbear, and consequently no binding contract for time. To that doctrine I fully subscribe. But in the last case, the usury was paid at the time the creditor promised to forbear; and the Court held that the surety was discharged; that although the contract was void as to the debtor, it was valid as to the creditor; and if he should sue before the expiration of the stipulated forbearance, the other party might have an action for damages. It was likened to a contract between an adult and an infant, where the adult is bound, though the infant is not. Although this decision comes from a learned and highly respectable Court, it has failed to convince my understanding. I am still unable to see how payment of the usury can make the agreement any more binding than it would be on a promise to pay in future. If the Kentucky statute is like ours, it makes all

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contracts for usury void, without any distinction between such as are executed in part, and such as are wholly executory ; and it makes the *contract* void, not *one side* of it only, but the *whole* contract, so that neither party is bound by it. If the debtor pays usury for further time, it either operates as a payment of so much money towards the original debt, or else the money may be recovered back at pleasure. And in either case, there is no sufficient consideration for a promise of any kind by the creditor. Payment, either in whole or in part, of a debt already due, cannot be a good consideration for a promise by the creditor ; for he gets nothing but his own. And if the money paid still belongs to the debtor, and may be recalled at pleasure, the creditor gets nothing at all ; and then it seems quite clear that there is no consideration to uphold his promise. The case put by the Court of a contract between an adult and an infant, is not entirely parallel ; for there, if the contract fails, it is because one party was not legally competent to make it, and not on account of any vice in the contract itself. But where there is usury, the contract is vicious : it is a thing forbidden by law. Again, very few contracts made by an infant are void ; for the most, they are only voidable ; and some of them cannot be avoided. But contracts infected with usury are absolutely void ; and they are all void, without exception.

If the usury laws are carried out into all their legitimate consequences when they operate against the creditor, as I think they should be, there is no good reason why they should not be carried to the same extent when they happen to operate in his favor. And as the statute does not declare the contract half good and half bad, but void, I think it altogether void. Neither party is bound, for there is no contract.

I am of opinion that the decree of the Court of Chancery should be affirmed.

GARDINER, J., said he concurred in the result of the opinion delivered by BRONSON, J., and also in the opinion upon all the points except that which holds that a surety is not a borrower within the provisions of the act of 1837.

JEWETT, C. J., delivered an opinion in favor of affirming the decree. So far as the bill sought relief on the ground of usury, he was of opinion that after a trial at law it was too late, under the circumstances, for the complainants to resort to a Court of Equity to impeach the judgment. The bill did not pretend that they were in any wise misled by the false statement of the payee of the note, that he had transferred it to Piercy the plaintiff, on the record in the action at law; and if they had verified their notice of the defence of usury according to the provisions of the act of 1837, they might have called the payee, as the plaintiff in interest, and examined him as a witness. The bill states that they expected to prove the usury by him on the trial, and it may therefore be presumed that the facts thus alleged, if true, might have been shewn, but for their own fault in omitting to take the necessary steps to entitle themselves to the proof. As to the second ground of relief, he was of opinion that the alleged agreements to forbear the payment of the note, in consideration of usurious premiums paid for such forbearance, were wholly void and therefore could not be set up by the sureties as a ground of discharge. It is conceded, he said, that an agreement to extend the time of payment, in consideration of an *executory* agreement to pay a usurious premium, is void, and does not suspend the remedy of the creditor against the principal debtor. But the distinction between that case and the case where the agreement is *executed* on the part of the debtor by the actual payment of the usurious premium, rests upon no solid foundation. In either case the statute declares the contract void, and the debtor can recover back the money so paid by action.

Upon these grounds he was in favor of affirming the decree of the Chancellor.

The other members of the Court concurred in the conclusion that the decree should be affirmed.

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A bill of exceptions will not lie to review the exercise of the discretion of a Circuit Judge on the trial of a cause, in disregarding a variance between the declaration and the proof.

Where a policy of insurance prohibited an assignment of the interest of the assured, "unless by the consent of the company manifested in writing," and the Secretary, on an application to him at the office of the company, endorsed upon the policy and subscribed a consent, it seems that his authority to do so, in the absence of evidence to the contrary, should be presumed.

But if it were necessary to prove his authority, a formal resolution of the Board of Directors need not be shewn. Evidence that the Secretary, he being the sole agent of the company in transacting business at their office, has been in the uniform habit of giving such consent in writing and made regular entries of his acts in the books of the company, without any objection or repudiation on the part of the company, is enough at least to carry the question of authority to the jury.

A mortgage given by the insured upon the property covered by the policy, is not an *alienation by sale or otherwise* within the meaning of the seventh section of the charter. (*Laws of 1836, p. 315 and 44.*)

And notwithstanding such mortgage, and an assignment of the policy to the mortgagee, with the consent of the company, a suit upon the policy to recover for a loss must be brought in the name of the insured.

On error from the Supreme Court, where an action was brought by Conover against the Mutual Insurance Company of the city and county of Albany, upon a policy of insurance. On the trial, Conover had a verdict for the amount of the loss in question, on which the Supreme Court rendered judgment in his favor. For the facts, so far as material, see the report of the case in the Supreme Court, (3 *Denio* 254,) and the opinion of JOHNSON, J.

R. W. Peckham, for plaintiffs in error.

M. T. Reynolds, for defendant in error.

JOHNSON, J. Whether there was a variance between the declaration and proof is not material to enquire, as it was at most only such an one as the Circuit Judge might properly

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disregard on the trial, and upon which no bill of exceptions will lie. (*Herk. Ins. Co. vs. Mann*, 4 *Hill* 187; *Mappa vs. Pearce*, 15 *Wend.* 669.)

The more material inquiry in this case is whether the consent to the assignment by the Secretary, Joice, to enable the plaintiff to procure a loan by a mortgage upon the insured property, was binding upon the company. For if that is not so, there is an end to this suit. The facts are briefly that the agent or attorney of Gridley, the party in interest, called at the company's office upon Joice, the Secretary, the person regularly in attendance there to transact their business, and stated to him that Gridley proposed to loan to the plaintiff, Conover, \$500, and take a mortgage upon the insured property, provided he could obtain the consent of the company to the assignment of the policy as security. That to enable the parties to carry out their arrangement, the Secretary endorsed the consent upon the policy. Whereupon the \$500 were advanced, and the mortgage and assignment executed. Joice testifies that he was in the habit frequently of giving consent to the assignment of policies for the same purpose, and always supposed he was authorized to do so by the by-laws or some resolution of the directors; though on looking into the by-laws and minutes, as it would seem for the first time on the trial, for some evidence of such authority, he was unable to find it, and thence concluded none such had been given. It further appeared on the trial that the policy of the President of the company had also been assigned to secure the payment of a mortgage upon his property given after the insurance, and that the consent was endorsed upon it in the same manner as the one in question. Also upon producing the book of policies where memorandums are entered of such as have been assigned, the consent in every instance was found to have been endorsed by the Secretary, Joice. Most of this evidence was objected to as improper. But I think it was properly admitted, for the purpose of showing not only who was entrusted with the company's business, but the manner

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in which transactions of this character had been uniformly conducted.

Some evidence was introduced on the part of the defendant below to show that these acts of their Secretary were never brought to the knowledge of the Board of Directors, or received their formal ratification. And it is insisted that inasmuch as the Board never, by any formal act, gave their sanction, and the by-laws required the consent in writing of the Directors to any conditional alienation by mortgage subsequent to the insurance, the consent in this case was unauthorized and void. I cannot subscribe to this doctrine. The Directors were bound to know the uniform course pursued by their sole agent in the transaction of their business at their office, especially where regular entries of his acts were made in their books, and they must be held responsible on the ground of a tacit assent and approval unless they can show that by a strict vigilance and scrutiny into his acts they were unable to ascertain the course he was pursuing, and could not therefore arrest it or put the public upon their guard. It is enough, it seems to me, that here the party in interest went to the sole place where the business of the company was transacted, and procured what was intended on all hands to be, and I think in effect was, an assent to the execution of the mortgage, as well as the assignment of the policy from one of the principal officers having the sole charge of the business, and that too in the same form as it had been frequently done there. (*Bank of Vergennes vs Warren*, 7 Hill 91.)

Incorporated companies whose business is necessarily conducted altogether by agents, should be required at their peril, to see to it that the officers and agents whom they employ, not only know what their powers and duties are, but that they do not habitually and as a part of their system of business transcend those powers. How else are third persons to deal with them with any degree of safety? They can have no access to the by-laws and resolutions of the board, and no means of judging in the particular instance whether the officer is or is not within the prescribed limits.

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All that Gridley can be supposed to have known in the case before us would be derived from the face of the policy. There he would only learn that the interest of the insured therein, was not assignable without the consent of the company manifested in writing in pursuance of the by-laws and endorsed upon the policy. He accordingly repairs to the office where he had a right to suppose he could have the consent manifested and endorsed in the proper form. It is done according to the system and in the form adopted and uniformly pursued there by an officer having charge of the business and who supposed this peculiarly within his province. In the faith that all is right, he advances his money and receives his mortgage and assignment. No objection is made to this or numerous similar transactions, and even after the fire, payment is refused upon an entirely different ground. Clearly, as it seems to me, the company are not now at liberty to dispute or deny the authority of their Secretary to endorse the consent in question. The objection that the execution of the mortgage avoided the policy, was not distinctly made on the trial. But had it been made there as distinctly as it is here it could have been of no avail, as it sufficiently appears that the only object the company could have in giving the consent was to enable Conover to borrow money by a mortgage upon the insured property.

Nor are we called upon to decide whether the absolute alienation by Conover after the assignment of the policy is a good defence, as the point was not raised on the trial. But if we were, I do not see how the interest of Gridley, the assignee, could be affected by it. (*Traders Ins. Co. vs. Roberts*, 9 *Wend.* 404.) The judgment, I think, should be affirmed.

GRAY, J. One ground of the motion for a nonsuit made on the trial was, that there was no proof that the Secretary of the Company had authority to consent to the assignment of the policy of insurance. On this point I cannot entertain a doubt that the evidence was pertinent and sufficient to carry the cause to the jury; and the jury having found in favor of

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the existence of the authority, their verdict is conclusive as to this branch of the case.

It was insisted, on the part of the plaintiffs in error, that the mortgage given by the defendant in error to Gridley, was an alienation of the property insured within the meaning of the seventh section of the act according to which this Company was incorporated, (*Stat.* 1836, p. 44, § 7,) and therefore that it avoided the policy. The language is, "whenever any property insured with this corporation shall be *alienated by sale or otherwise*, the policy shall thereupon be void," &c. The Legislature without doubt used the word in the ordinary sense which belongs to it, and it seems to me quite clear that it does not embrace a mortgage which creates but a lien or security, and does not transfer the title.

Nor did the policy become void by reason of the 13th by-law of the Company, requiring, when a mortgage is given by the insured, that he shall make a written representation thereof to the Company. It may fairly be presumed from the evidence in the case, and the jury have so found, that this requirement was complied with, or that it was dispensed with by the authority of the Company.

If the giving of the mortgage by the insured had been an *alienation* of the property within the seventh section of the act, the action would have to be brought in the name of the assignee of the policy; but as the case was not within that section, the suit was properly brought in the name of Conover. (*Jessel vs. Williamsburgh Ins. Co.* 3 *Hill* 88; *Mann vs. Herkimer Ins. Co.* 4 *Hill* 187.)

I see no error in the judgment, and am of opinion that the same should be affirmed.

Judgment affirmed.

MATTISON vs. BAUCUS.

Where, in a mortgage of personal property, it was provided that the mortgagor should permit the mortgagee to "have, possess, occupy, and enjoy," the mortgaged property, whenever he should demand the same, and after the mortgagor had absconded, the mortgagee took possession of the property by virtue of the mortgage; *held*, that the interest of the mortgagor was not the subject of levy upon execution, although the debt secured by the mortgage had not, at the time of the levy, become due.

It seems that the interest of a mortgagor of personal property, even before for seizure, where he has not the right of possession for a definite period, is but a right of redemption merely, which is not the subject of levy and sale upon execution.

On error from the Supreme Court. Mattison sued Baucus in trover in a Justice's Court, in the county of Rensselaer, and recovered judgment. The defendant appealed to the Common Pleas of that county, where the cause was tried in 1844, and the plaintiff again recovered judgment for the value of the property in question. A bill of exceptions was taken by the defendant on that trial, and a writ of error brought by him into the Supreme Court, where the judgment of the Common Pleas was reversed, and a *venire de novo* awarded. A judgment record of such reversal being made up, Mattison now brings error to this Court. The facts, so far as material to the decision of the Court, are stated in the opinion of GARDINER, J.

T. C. Ripley, for plaintiff in error.

J. Pierson, for defendant in error.

GARDINER, J., delivered the opinion of the Court. Upon the trial in the Common Pleas, the plaintiff gave evidence tending to prove a judgment in favor of one Basset against John Foster, for \$20,66, and execution issued upon the same and delivered to Mattison, the plaintiff, who was a constable, by virtue of which he levied upon the property in question in

Mattison & Baucus.

July, 1839, then being in possession of one Lyon. It further appeared that Foster, the judgment debtor, had previously and on the 11th day of June, 1839, executed a chattel mortgage of said property, in due form of law, to Lyon, to secure a debt owing by the former to the latter, of \$48,16, with interest, to be paid in six months from the date of said mortgage. The mortgage contained a provision, "that the said Foster should permit Lyon, his executors, &c., to have, possess, occupy and enjoy, the said articles of property, whenever he or they should demand the same." It also appeared that Foster had absconded, and that Lyon had taken possession of the property, under the mortgage, prior to the levy by Mattison, and that the property had been converted subsequent to the said levy by the defendant, Baucus, who took it from the possession of Lyon, the mortgagee, where it had remained from the time of the levy to the time of the conversion by the defendant. It was also proved, that after the conversion aforesaid, and subsequent to the bringing of the appeal, Bassett, the judgment creditor, took an assignment of the mortgage from Lyon, which he held at the time of the trial in the Common Pleas.

The defendant moved for a nonsuit upon various grounds, among others, "that the plaintiff never acquired any possession by his pretended levy so as to enable him to maintain trespass or trover. That the actual and legal possession of the property was in Lyon, under the mortgage from Foster." The Common Pleas refused to nonsuit, and the defendant excepted. The Court directed the jury to find a verdict for the plaintiff for \$56,47, being the whole value of the property, to which direction the defendant also excepted.

Both of the exceptions are well taken. Cases in the Supreme Court and the Court of Errors, recognize the principle, that the interest of a mortgagor having a right to redeem, and the right to the possession of the mortgaged property for a definite period, may be sold upon execution. (*Marsh vs. Lawrence*, 4 Cow. 467; *Otis vs. Wood*, 3 Wend. 500; *Baily vs. Burton*, 8 Wend. 347-8; 10 Wend. 322; 17 Wend. 57.)

The debt secured by the mortgage to Lyon, was not payable, according to the provisions of that instrument, until the month of December, 1839. Foster, the mortgagor, had therefore a right of redemption. But by the express terms of the mortgage, the mortgagee "was at all times, upon demand, entitled to possess, occupy, and enjoy," the property mortgaged, and the case shows that he had taken and held possession at the time of the levy. The interest of Foster, the mortgagor and judgment debtor, was a right of redemption only, a mere chose in action, not the subject of levy and sale upon execution, according to the authorities cited, unless united with a right to the possession for a definite period. (3 *Wend.* 500.)

The levy therefore by the plaintiff, was wholly inoperative. It gave no lien upon the property, and consequently no right to maintain this action.

The nonsuit should therefore have been granted, and the judgment of the Supreme Court reversing that of the Common Pleas was right. It is unnecessary to consider the other questions made at the trial, as the point decided will dispose of the cause finally.

Judgment affirmed.

JONES, JOHNSON and WRIGHT, Js., dissented.

CORNELIA DODGE, Appellant, vs. RALPH MANNING, HARMANUS BECKER, and ALEXANDER BOYD, Respondents.

A testator by his will, made in 1804, gave all his real and personal estate to his wife during her life, and after her death to his grandson. To his granddaughter he gave a legacy, to be paid by his grandson, "out of the estate, in one year after he should become of age. The grandson became of age in 1820, but the widow's life estate did not terminate until 1832; *held*, that the legacy was not payable until the latter period, and therefore that a bill filed soon afterwards, to recover the legacy, was not liable to a presumption of payment from lapse of time.

The grandson, in 1826, mortgaged the real estate which he took under the will and portions of it were purchased by the respondents, with notice of the legacy, at a sale upon the foreclosure of the mortgage. Upon bill filed by the legatees against the respondents and the grandson, *further held*, that the grandson, by accepting the estate, became personally liable for the legacy, that the legacy was an equitable charge upon the real estate, but that the respondents should not be charged in respect to the real estate in their hands, except in case of a deficiency after the remedy should be exhausted against the grandson.

Appeal from Chancery. The appellant filed her bill before the Vice Chancellor of the Fourth Circuit, against the respondents and John B. Borst, in which the case was stated in substance as follows: John I. Becker, of Middleburgh, Schoharie county, died in or about the year 1804, having first made his last will and testament, by which, after devising twenty acres of land to his daughter Caty, the wife of Michael Borst, he gave all the residue of his estate, real and personal, to his wife Cornelia during her life, and after her death to the defendant, John B. Borst, who was his grand-son, if he should arrive at the age of twenty-one years. To his grand-daughter Cornelia, the appellant, he gave a legacy of two hundred and fifty dollars, to be paid out of his estate by his said grandson, John B. Borst, in one year after he should arrive at the age of twenty-one. If John B. Borst should not arrive at the age of twenty-one, then the estate was, by the will, given over to Peter Borst, who was in that case directed to pay the legacy out of the estate. Other legacies were also given by the will to the testator's other grand-children, with the same

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direction as to their payment. The testator's wife Cornelia, and two other persons, were appointed executors. John B. Borst became of age in 1820, and Cornelia, the testator's widow, died in 1832. In the year 1826, John B. Borst executed a mortgage upon the real estate so devised to him, to George Maxwell, to secure the payment of \$6,000. In July, 1834, this mortgage having been foreclosed in Chancery, the premises covered by it were sold by a master, under the decree, in separate parcels, and the respondents and J. B. Borst became the purchasers separately, subject to the payment of the legacy to the appellant, and entered into possession of the premises respectively purchased by them. The prayer of the bill was, that the defendants, or such of them as ought to do so, might be decreed to pay the legacy and interest, and if necessary, that the premises in their possession might be sold, &c., and for general relief.

The defendant, John B. Borst, answered separately admitting the facts charged in the bill.

The respondents answered, admitting that the legacy was mentioned as a charge upon the land at the time they purchased, but denying that they purchased in any manner subject to the legacy, averring also that the mortgage under which they purchased was not subject to the legacy, and that the sale under the decree was absolute. They also alleged that the legacy had been paid, and if not, they insisted that John B. Borst, by accepting the devise, became personally liable therefor, and that it was an equitable lien upon so much of the premises as was owned by him. The answer also set up, that the testator left personal estate to an amount sufficient to pay the legacies. A replication was filed to the respondents' answer, and proof was taken, which is not necessary to be stated further than that it related to the allegation of payment, and to what was said about the legacy at the time the defendants purchased at the master's sale, and that it tended to show that the personal property left by the testator was sufficient to pay all the legacies.

The Vice Chancellor, on the pleadings and proofs, made a

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decree declaring that the legacy was a charge on the real estate purchased by the defendants respectively, that the complainant was entitled to recover the same, and directing a reference to compute the amount and apportion the same among the defendants according to their respective bids, &c. The respondents appealed to the Chancellor, who reversed the decree of the Vice Chancellor, and directed the bill to be dismissed as to them, with costs, upon the ground principally, that from the evidence in connection with the lapse of time, it appeared satisfactorily to him that the legacy had been paid. He however made a decree against the defendant, John B. Borst, for the payment of the legacy and costs of suit, and charged the portion of the premises owned by him with such payment. The complainant appealed to this Court.

N. Hill, Jr., for appellant.

M. T. Reynolds, for respondents.

GRAY, J. One of the reasons, if not the principal one, assigned by the Chancellor for a decree dismissing the bill as to the respondents, is, that the legacy to recover which the bill was filed, had been paid; and this conclusion is supposed to be justified by the lapse of time and the evidence of one of the witnesses. If I do not misapprehend the effect of the will, no presumption of payment can be derived from the lapse of time. It is true that according to one clause in the will the legacy became payable in one year after John B. Borst attained his majority, which was in 1820; but it was directed to be paid by Borst "*out of the estate*" given to him, and on looking at the whole will it is entirely clear that he was not to have the estate until the death of his grand-mother, the testator's widow, which did not occur until 1832. It seems to me, therefore, that the legacy did not become due until the period last named, and it is not pretended that the time which elapsed between that period and the filing of the bill, would warrant in the slightest degree a presumption of payment.

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As to the evidence taken on this point, we are all of opinion, that there was nothing in it to justify the conclusion at which the Chancellor arrived.

The decision of the Vice-Chancellor charged all the defendants with the payment of the legacy and costs, without any discrimination founded upon the equitable right of the respondents to insist, that the defendant, John B. Borst, and the real and personal estate of the testator in his hands, should be first charged, and that a resort should not be had to the estate purchased by them, until the remedy against Borst should first be exhausted. In this respect I am of opinion that the Vice Chancellor erred. It is true, that by the provisions of the will, the legacy in question became an equitable charge upon all the real estate devised to Borst, of which that purchased by the respondents respectively, at the master's sale, is a part. But the devisee, by accepting the real and personal estate devised and bequeathed to him, became personally liable for the payment of the legacies which the will directed him to pay. He is therefore primarily liable, and the remedy should first be exhausted against him and the real and personal estate of the testator remaining in his hands, before the respondents should be charged in respect to the real estate purchased by them. If they had purchased expressly subject to the payment of the legacy, that of itself might have made the estate in their hands directly and primarily chargeable. But I concur with the Chancellor that there is nothing in the evidence to justify the inference that they purchased in that manner. The admission in their answer, as well as the evidence, merely shews that they had notice of the existence of the legacy. If the decree of the Chancellor, therefore, had modified that of the Vice Chancellor in accordance with these views, it would, in my judgment, have been a correct disposition of the case. But as the Chancellor's decree directs the bill to be dismissed, as to the respondents, with costs, it should be reversed, and a decree should be entered charging the lands purchased by them, with the payment of the legacy and costs of suit, so far as there may be a deficiency after the appellant

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shall have exhausted her remedy against the defendant, John B. Borst.

JEWETT, CH. J. By the terms of the will, the legacy given to the complainant was to be paid out of the estate of the testator, by John B. Borst, sole devisee and legatee of all the property of the testator, (except twenty acres of land devised to another) real and personal, subject to the life estate therein devised and bequeathed to the testator's widow. The legacy thus given became an equitable lien upon the reversionary interest, as well in the real as personal property, so devised and bequeathed to Borst; and a personal charge upon him in case of his acceptance of the testator's bounty, in respect to the estate devised and bequeathed to him. (*Harris vs. Fly*, 7 *Paige* 421; *Glen vs. Fisher*, 6 *Johns. Chy.* 35.)

J. B. Borst accepted the devise. That is shown by the mortgage upon the real estate devised, executed by him to Maxwell, in 1826, containing a power of sale. He thereby became personally bound to pay the legacy given to the complainant according to the terms of the will, which a Court of Equity will compel him to discharge. As between him and the complainant, it is not material for her to show, that he had procured an account and payment from the executors of the testator, of the proceeds of the personal estate prior to the filing of her bill. She may sustain her claim against him personally, and enforce her lien against any of the property devised or bequeathed to him remaining in his hands, without calling upon the executors of the testator for an account and payment; although it would have been competent for her to have made the executors parties with him, and thereby reached the personal fund in his hands, that being the primary fund for the payment of her legacy.

But as between the complainant and the defendants, Manning, Becker and Boyd, they have an equitable right as against her, to insist that she shall first exhaust her remedy, not only as against Borst personally, but as against that portion of the property, real and personal, remaining in his hands, or to

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which he is entitled, before she can enforce her lien as against that portion of the property purchased by them on the sale under the mortgage foreclosure.

Although the complainant's legacy in equity is a prior lien upon all of the estate given to Borst by the will, for its satisfaction, yet that portion of it remaining in the hands of Borst and the proceeds of the personal estate to which he is entitled, is primarily liable for its payment in exoneration of those portions which have been purchased by Manning, Becker and Boyd. If the bill showed that the personal estate had been exhausted in the course of administration, or that the persons who are accountable for it are not responsible, or that it had been accounted for and paid or delivered to Borst, or if the executors in whose hands the same remained, were parties to this suit; in either case the complainant might have been entitled, in case her legacy remained unpaid, to a decree for payment and satisfaction out of that portion of the real estate so purchased by Manning, Becker and Boyd, for so much as should remain unpaid after applying what should be received under a decree against Borst personally, and for sale of that portion of the property remaining in his hands, and after the application of the avails of the personal estate undisposed of by him. But the complainant has failed to present by her bill such a case as will entitle her to a decree to enforce her lien as against the devised premises in the hands of Manning, Becker and Boyd, in the event that she does not obtain satisfaction under a decree against Borst, and for the sale of that portion of the premises still remaining in his hands, on the ground that it does not appear but that the personal estate still remains in the hands of the executors which might be reached and applied upon or in satisfaction of her demand.

The Chancellor dismissed the bill as against Manning, Becker, and Boyd, on the ground that there was sufficient evidence to show that the complainant's legacy had been paid to Dodge, her husband, in his life time. I have considered the evidence relied on to show that fact, and am constrained to say that I am unable to come to that conclusion. There are,

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it is true, some circumstances which render it quite probable that payment was made as is alleged, but I do not see in the case any thing beyond that, that should be deemed proof of the fact. The testimony of Hezekiah Manning, the only witness to that point, falls far short of it. In my judgment it amounts to but little else than an inference of the witness founded upon conjecture. But from the view which I have taken of the case, I am of opinion that the decree was right, and should be affirmed.

Bronson, J., also delivered an opinion in favor of affirming the decree, substantially upon the grounds stated in the opinion of JEWETT, CH. J.

The other Judges concurred in the result of the opinion delivered by GRAY, J., and therefore it was

Ordered accordingly.

CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

OF THE

STATE OF NEW-YORK,

IN JUNE AND SEPTEMBER TERMS, 1843.

1	305
118	301
1	305
130	175

WHITNEY vs. ALLAIRE.

Where one conveys or leases to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right.

And in such a case the proper measure of damages in favor of the lessee, is the sum which in good faith he is obliged to pay to a third person to obtain what the lease would have given him if the representation had been true.

A demise for a term commencing *in futuro*, passes a present interest in the term to the lessee.

And the lessee by taking possession at the commencement of the term, and after having discovered the fraud, waives thereby only his right to rescind the contract, but not his right to recover the damages occasioned by the fraud.

The defendant, in February, executed to the plaintiff a writing under seal, stating that he had hired of the plaintiff a certain water lot and his right to a wharf in the city of New-York, for one year from the first of May next, at \$1000 rent. He was induced to make the contract through the fraudulent representations of the plaintiff, that the right mentioned in the lease comprehended a parcel of land which in fact belonged to the corporation of the city of New-York. The defendant discovered the fraud before the first of May, and obtained from the corporation a lease for that parcel at an annual rent of \$1000. On the first of May he took possession of the whole and occupied during the year. In covenant for the rent; *held*, that he was entitled to a deduction by reason of the fraud, of the sum which he was obliged in good faith to pay for the corporation lease.

Whitney v. Allaire.

It seems, that an action will lie for a fraudulent representation by which a party is induced to enter into a contract which is executory merely. *Per* GARDINER, J.

It seems also, that where one conveys or *leases* real estate, an action will lie for a fraudulent representation as to the title.

WHITNEY sued Allaire in covenant for rent, in the superior court of the city of New-York. On the first trial, the charge of the court upon the question raised was favorable to the plaintiff, and a verdict was had and judgment rendered for the amount of rent claimed. That judgment was reversed by the supreme court, on error brought, and a new trial ordered. (*See* 1 *Hill*, 484.) On another trial, the verdict and judgment of the superior court were in favor of the defendant. The plaintiff, having made a bill of exceptions, brought error into the supreme court, where the judgment was affirmed. The plaintiff brings error into this court.

The case, as it appeared on the last trial, was this: The plaintiff claimed to recover upon an instrument duly signed and sealed by the defendant, in these words: "I have this day hired of Stephen Whitney the water lot, and his right to the wharf on the east side of Market-slip, for one year from the 1st of May next, at the yearly rent of \$1000 and taxes on said water lot, whatever it may be, the rent to be paid quarterly. 9th February, 1837."

After the plaintiff had rested, the defendant called Richard C. White, who had been sworn for the plaintiff, and offered to prove the representations made by the plaintiff to the witness, (who was the general agent of the defendant) respecting *the extent of his right* in the wharf on the east side of Market-slip, previous to the signing of the above memorandum. The evidence was objected to by the plaintiff's counsel, the objection overruled, and an exception taken to the decision.

The defendant then gave evidence tending to show that he was induced to sign the memorandum through a fraudulent representation of Whitney, that the right which was mentioned in the lease comprehended a certain other parcel of land which turned out to belong to the corporation of the city of New-York; that Allaire discovered the fraud *before the term commenced*.

and that in order to secure the parcel of land owned by the corporation, and which was necessary for the business of the defendant, the latter was under the necessity of taking a lease thereof from the corporation, at an annual rent of \$1000.

White, the witness above mentioned, after testifying to the conversation which occurred between him and the plaintiff prior to the signing of the memorandum by the defendant, stated that *the plaintiff told him that the wharf on the east side of Market-slip was his, and from this, witness supposed it was his, and so informed the defendant.* This testimony was received without objection. The plaintiff's counsel then examined the witness, and the defendant on further examination proposed to ask the witness the following question: "What did you understand, at the time of the said conversation, from the statement of the plaintiff, that you did hire from him?" The counsel for the plaintiff objected to the question, the objection was overruled, and the plaintiff excepted.

The judge charged the jury that to defeat the right of the plaintiff to recover, the defendant must prove that the plaintiff had been guilty of fraud, and not that there had been a mistake or misconception upon the part of the defendant; that the plaintiff must have intended to mislead or entrap the defendant. That although the defendant, after the discovery of the extent of the plaintiff's interest in the wharf in question, had entered into the possession thereof and enjoyed the use of the same for the term specified, without rescinding or offering to rescind the contract, yet he had a right to set up any fraudulent representations or concealment of the plaintiff, in respect to said contract, in bar of his claim for the rent or in reduction of the amount of such claim; that if the jury should find that a fraud had been committed by the plaintiff, in adjusting the matter, the court would lay down the rule, that the jury should consider what would have been a fair rent of the 150 feet of the wharf owned by the plaintiff; to this sum should be added the three quarters rent due, and taxes claimed in the declaration, and from that should be deducted the \$1000 paid to the corporation, if they were satisfied that the same was a reasonable

Whitney v. Affaire.

amount, and was agreed to be paid by the defendant in good faith, without any intent to defraud the plaintiff. The counsel of the plaintiff excepted to the whole and each part of the charge, and the jury returned a verdict for the defendant.

E. Sandford, for plaintiff in error.

F. B. Cutting, for defendant in error.

GARDINER, J. The first exception to the admissibility of *any evidence* to establish the fraud, is sought to be sustained upon two grounds: 1. That the fraud relates to the title to lands. 2. Because the matters given in evidence are not embraced within the lease; as the plaintiff did not demise the wharf, but expressly limited it to his *right* to the wharf.

For more than thirty years it has been the settled doctrine of the courts of this state, that fraudulent representations in reference to the title of real estate, accompanied with damage, is a good ground of action, and that it is immaterial whether any or what covenants are contained in the deed of conveyance. This was held in *Wardell v. Fosdick*, (13 John. 325,) where the defendant fraudulently sold without any title, but in effect with full covenants. In *Monell v. Colden*, (13 John. 402, 3,) the representation was that the vendor, as riparian owner, had the pre-emptive right to a grant of land under water in the Hudson river, and opposite the purchased premises. In *Ward v. Wiman*, (17 Wend. 193,) the declaration was that the premises were free from incumbrance, and an action for the fraud was sustained although the deed contained a covenant to the same effect. In *Culver v. Avery*, (7 Wend. 386,) the affirmation was that the premises were clear of any other incumbrance than the mortgage under which the sale was effected, and that the purchaser would acquire a perfect title. In the first case cited, the fraud pertained to the title of the land conveyed. In the second, to a privilege annexed to the land; in the third, to an incumbrance upon the title; and in the last, both to the title

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and to incumbrances. Such has been the adjudication of our state during the period mentioned.

The distinction between representations as to the title to land, and matters collateral to the land, was taken in *Culver v. Avery*, and repudiated, (7 *Wend.* 386,) and I think with reason. There is no middle ground of principle, between excluding evidence of fraudulent representations in all cases of the conveyance of land, or admitting them when they refer to the title. They all are or may be equally obnoxious to objections arising from the statute of frauds, and in each case the vendee can protect himself by appropriate covenants. The rule thus settled, affecting as it does the right of property, should be upheld unless its maintenance would conflict with established principles. No such conflict is perceived. On the contrary, it harmonizes with the law in relation to personal property, requires fair dealing from the vendor in each case, and permits the vendee, without a penalty upon his credulity, to trust to declarations of material facts within the knowledge of the other party. In a word, to treat with the vendor upon the presumption that he is an honest man.

2. There is no force in the objection that the plaintiff did not demise the wharf, but only his *right* to the wharf, and therefore the representation did not relate to a matter within the lease. The question in all these cases is not what passed by the conveyance, but what would have passed to the vendee, had the representations been true. The plaintiff fraudulently represented himself as the owner of three hundred feet of wharf, and the defendant would have acquired that quantity by his lease, had the statement been true. The lessor, however, knew at the time that he was the owner of one hundred and fifty feet only, and the falsehood as to the extent of his right, was at once the inducement to the contract, and the reason why it was inoperative. (*Monell v. Colden*, *supra*; *Dobell v. Stevens*, 3 *Barn. & Cress.* 623.)

The question put to White, as to his understanding of the extent of the plaintiff's interest from his statement to him, was objectionable; but it could not have affected the verdict of the

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jury. The witness had previously sworn, without any objection, "that the plaintiff told him that the wharf on the east side of Market-slip was his, and *from this, witness supposed* that the wharf was his, and so informed the defendant." His "understanding," derived from the plaintiff's statement, was therefore a part of the evidence before the jury, and its repetition could not have affected the plaintiff injuriously.

A more important question arises under the exception to that part of the charge in which the jury were told that the discovery of the fraud, and the *subsequent entry* of the defendant upon and the *enjoyment of the demised premises*, would not bar his right to damages.

In support of this exception it was argued, 1st. That until the discovery of the fraud, the defendant was not *bound* by the memorandum signed by him, and then only at his election: that prior to his adoption, the writing was in the nature of a *proposition*, and being adopted with a full knowledge of all the material facts, there could be no *fraud*, because no *deception* when the contract had its *inception*.

This hypothesis is rather specious than solid. The agreement when executed was binding upon both parties, and could be repudiated by neither without the assent of the other, except by an action. If the defendant had discovered the fraud the day after the contract was made, he could have no relief short of a court of equity. In the mean time he would lose the advantage of a sale of his interest, would be in form legally responsible on his covenant, and subject to the doubtful chances of a litigation as the only means of reinstating himself in his former position. He made, as he had a right to suppose, an advantageous bargain, when in truth he had only purchased a lawsuit as a means of deliverance from a bad one. Now the very gist of the fraud consists in placing a man in this situation. It was an injury for which the supreme court have adjudged an action would lie, when the contract was consummated. I see no reason to doubt the correctness of their conclusion. Every one must perceive the distinction between a mere proposition, and an agreement requiring an action to avoid it; between the

right to annul a contract by the mere volition of one of the parties, and a right to resort to a court of justice for the same purpose.

In the second place, it was insisted that if there was an agreement, it was executory when the fraud was discovered; and in such a case, whatever might be the rule as to contracts wholly or partially executed, the defendant, if he affirmed the contract, waived all right to damage for the fraud. In the first place, the contract was not executory, if by that is meant that until entry, the lease was a chose in action. A lease to commence *in futuro* is grantable. (*Shep. Touch.* 241.) The interest vests presently, although it does not take effect in possession until a future time. (*Comyn's Dig. tit. Assignment; Taylor's Land. and Ten.* 207.) The defendant, therefore, upon delivery of the lease, acquired an interest in the term which he could assign, and for which he could maintain ejectment without any further act upon his part, if possession was withheld after his right of entry became complete. (*Taylor's Land. and Ten.* 132; *Adams on Eject.* 2d ed. 33, 161.) The interest of the defendant cannot be distinguished from the sale of a chattel to be delivered at a future period, to be paid for subsequent to delivery. The property would pass by the contract of sale, and replevin might be maintained by the purchaser after the time stipulated for the delivery. (2 *Sumn. R.* 211.) But if the agreement was executory, it would not, it is believed, change the right of the parties. It is conceded that if the contract had been partly executed, even in the most trifling particular, the defendant would have the right to rescind and bring his action for the deceit, or affirm the contract and have his remedy by way of recoupment when sued for the rent. Why should he not have the same remedies when the contract is executory? In neither case, according to the assumption of the plaintiff, could there be a contract until ratified with a knowledge of the fraud. And if an adoption under such circumstances, of the agreement, is an abandonment by the person defrauded, of his claim to damages for the deceit in the one case, it must be in both. In neither will repudiation of the contract alone, as I have attempted to

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show, relieve the party defrauded from his responsibility, and restore him to his rights as they existed prior to the agreement. No such distinction is recognized by the authorities. It is true, that if a party affirms a contract with knowledge of the fraud, he affirms it wholly, and this whether it is executory, or partially executed. But in neither case does he affirm it as a contract made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement. The case 5 *Mees. & Wels. R.* 83, is consistent with this doctrine, and the cases referred to in the opinion of the supreme court cannot otherwise be reconciled with each other or first principles.

The last question relates to the damages. The rule given to the jury was as favorable as the plaintiff had a right to require. The measure of damages in an action upon a warranty, and for fraud in the sale of personal property, are the same. In either case they are determined by the difference in value between the article sold, and what it should be according to the warranty or representation. (*Sherwood v. Sutton*, 5 *Mason*, 1; *Clare v. Maynard*, 6 *Adol. & Ellis*, 519; 4 *Hill*, 625.) The same rule obtains, I apprehend, upon the sale of real estate, where the action is for deceit; although a different one is applied when the suit is brought upon a certain class of covenants, such as that of warranty, quiet enjoyment, seisin, &c. which is founded upon considerations of public policy, without reference to the actual damages sustained by the party.

In 13 *John*. 395, *supra*, it was held that the defendant was chargeable with *all the damages* resulting from the false representations. In *Van Epps v. Harrison*, (5 *Hill*, 69,) this rule was applied to an action upon a bond given for the purchase money of land, and where the defendant was suffered to recoup damages on occasion of the fraud of the vendor. Bronson, J. remarks, that the jury must inquire how much *less* the land was worth for building purposes than it would have been had the representations of the vendor been true..

This rule of compensation is founded upon sound principles of

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morality: It compels the fraudulent vendor to make good the representations, upon the faith of which the vendee entered into the contract. This is but just. Applied to this case, it will at least justify the charge, and the verdict of the jury. The judgment should be affirmed.

BRONSON, J. It is not necessary in this case to decide, whether an action will lie for a false and fraudulent representation by the vendor of real estate that he has title to the property; for that question seems not to have been made on the trial. And besides, the representation of which the defendant complains related to the extent of the demised premises, rather than the landlord's title to the property. The conveyance was of all the plaintiff's right to a wharf, without specifying its boundary or extent; and the complaint is, that the plaintiff said he owned the whole wharf, which is three hundred feet in length, when in truth he owned only one half of it.

Actions have been sustained where the deceit was in relation to some collateral thing, as the rents or other profits derived from the land, things appurtenant to it, the incumbrances upon it, the location, quality or condition of the land, what the vendor paid for it, and the like. (*Ekins v. Tresham*, 1 *Lev.* 102; 1 *Keb.* 510, 518, 522, *S. C.*, by the name of *Leakins v. Clizard*; *Lysney v. Selby*, 2 *Ld. Raym.* 1118; 1 *Salk.* 211, *S. C.*, by the name of *Risney v. Selby*; *Dobell v. Stevens*, 3 *B. & C.* 623; *Bowring v. Stevens*, 2 *C. & P.* 337; *Pilmore v. Hood*, 5 *Bing. N. C.* 97; *Holbrook v. Burt*, 22 *Pick.* 546; *Monell v. Colden*, 13 *John.* 395; *Culver v. Avery*, 7 *Wend.* 380; *Ward v. Wiman*, 17 *id.* 193; *Early v. Garret*, 9 *B. & C.* 928; *Sandford v. Handy*, 23 *Wend.* 260; *Van Epps v. Harrison*, 5 *Hill*, 63.) Some of these cases are open to observation; but it is enough for the present to say, that in none of them was the false representation upon the naked fact of title. In *Wardell v. Fosdick*, (13 *John.* 325,) the defendants fraudulently sold and conveyed land which had no real existence; and it was held that the purchaser might treat the deed as a nullity, and have an action on the case for the deceit. In

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Bostwick v. Lewis, (1 Day, 250,) there was a combination to defraud the purchaser in relation to the *quality* of the land, as well as the title to it; and it may fairly be inferred from the report, that the recovery was on the ground of fraud in relation to the quality alone. Although evidence was given that the title to a part of the property was out of the vendor, it was admitted for the sole purpose of showing that the residue of the tract was of no value. In *Wade v. Thurman*, (2 Bibb, 583,) it was held that the vendee might have an action against the vendor for falsely representing that the title to the land was in a *third person, who would convey at any time*. If this case does not go too far to prove any thing, it is sufficient to say that it is not the case of a fraudulent representation by the vendor of title in himself; and I do not find that such an action has ever been maintained. The learned judge who delivered the opinion of the court in *Leonard v. Pitney*, (5 Wend. 30,) evidently thought that such an action would not lie; and the case of *Roswell v. Vaughan*, (Cro. Jac. 196,) as understood by Lord Holt and Powell, J. in *Lysney v. Selby*, (2 Ld. Raym. 1119,) tends to the same conclusion. It is a strong argument against the action that no precedent for it has been found.

In the usual course of business men insert covenants in their conveyances of real estate where it is intended that the vendor shall answer for the goodness of the title; and it is easy to see that bad consequences may follow if the vendee shall be allowed to lay aside his deed, and have an action founded upon conversations about the title pending the bargain. In *Dobell v. Stevens*, (3 B. & C. 623,) where the vendee of a public house was allowed to recover in an action for the deceitful representations of the vendor in relation to the amount of business done in the house, Chief Justice Abbott said, the representation was not of any matter or quality pertaining to the thing sold, and therefore likely to be mentioned in the conveyance, but was altogether collateral to it; as was the case in the case of *Lysney v. Selby*. And in *Monell v. Corden*, (13 John. 403,) Thompson, Ch. J. remarked, that the false representation was not respecting any thing to be included in the deed, but with

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respect to a privilege which the plaintiffs were to acquire in consequence of owning the land on the shore adjoining the river. The intimation in both of these cases is, that had the fraud related to the title, or any thing else which is usually provided for in the conveyance, the action could not have been maintained.

I do not intend to express a definitive opinion on the point; and have only said enough to show that it is a grave question, which, as it is not necessarily before us, should not be regarded as settled by our decision.

A present interest in the term passed by the lease: (*Allaire v. Whitney*, 1 *Hill*, 484 :) and as the contract was not wholly executory when the defendant discovered the fraud, the question which was considered in *The Saratoga R. R. Co. v. Row*, (24 *Wend.* 74,) does not arise.

The defendant called his agent, White, as a witness, who gave the conversation between himself and the plaintiff about hiring the wharf; the defendant was then allowed to ask him what he understood from the statement made by the plaintiff on that occasion; and the witness answered that he understood from the conversation that the plaintiff owned the whole wharf from Water-street to the end of the pier. The plaintiff was not answerable for the manner in which the witness understood the conversation, unless he had a right so to understand it; and how it should be understood was a question for the jury. It was for them, and not the witness, to draw the proper inference from what the plaintiff said. I see no principle on which the evidence could be properly received, and on that ground I think the judgment should be reversed, and a venire de novo be awarded.

WRIGHT, J. was also for reversal on the same ground; but on the other questions he concurred with GARDINER, J.

JONES, J. orally delivered an opinion for reversal on the same ground with BRONSON, J.; also on the ground that the defendant, by taking and enjoying the possession after the discovery

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of the alleged fraud, had elected to affirm the contract, and therefore had no legal cause of complaint. He also thought the rule of damages was improperly laid down at the trial.

GRAY, J. concurred with JONES, J.

JEWETT, C. J., RUGGLES, J. and JOHNSON, J. concurred in the opinion of GARDINER, J.

Judgment affirmed.

SHERMAN vs. THE MAYOR, ALDERMEN AND COMMONALTY
OF THE CITY OF NEW-YORK.

S. contracted with the corporation of the city of New-York to furnish all the materials and labor necessary to complete the *excavation*, re-filling, and re-paving of a trench of specified dimensions for water pipes. The corporation agreed to pay as a "*compensation for such excavation, re-filling, and re-paving,*" as follows: "*For executing the digging*" and re-filling, seven cents per cubic yard; for re-paving, &c. four cents per square yard. A considerable portion of the trench was excavated through hard pan, and this was proved to be worth 75 cents per cubic yard. Another portion was through rock, worth \$1.00 per cubic yard. It was also shown that seven cents (the contract price) per yard was the lowest price for excavating common earth. *Held*, nevertheless, that S. could recover nothing beyond the contract price, and that extrinsic evidence was not admissible to prove the value of excavating hard pan and rock.

The contract provided that, as the work progressed, the engineer of the corporation should, upon the request of the contractor, make estimates of the work done, which estimates were to be paid on the next pay day, less ten per cent; also that when the work was done, the engineer should make a final estimate of all moneys due to the contractor, and then the whole to be paid. The engineer accordingly made a final estimate. It seems, however, competent in such a case, to resort to other proof of the amount of the work.

ON error from the supreme court. Sherman sued the mayor aldermen and commonalty of the city of New-York, in the superior court of that city. The cause was heard before referees appointed by that court, and the case was this: On the 17th of November, 1842, a written contract, under seal, was entered

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into between the plaintiff and defendants, whereby the plaintiff agreed "*to furnish all the materials and labor necessary to complete the excavation, back filling, ramming, and re-paving*" of a trench for water pipes in 14th street, from Union square to avenue A. The trench was to be six feet wide at the bottom, and eight and a half feet deep. The back filling and ramming was defined by the contract to be the filling up of the trench in a certain specified manner, after the pipes should be laid. The compensation for the work was provided for in the same agreement in these words: "And the parties of the second part agree to pay the party of the first part *in full compensation for the excavation, back filling, ramming and re-paving* aforesaid :

"*For executing the digging, back filling, and ramming* of the said trench, at the rate of seven cents per cubic yard. For re-paving," &c.

It was also provided in the contract, that the engineer of the corporation "should, upon request of the contractor, make estimates of the work actually completed, and not included in any previous estimate; and that payments should be made upon such estimates, at the succeeding pay day as by law established; ten per cent being retained until thirty days after the completion of the whole work, when a final estimate was to be made of all moneys due to the contractor, the same to be paid at the next succeeding pay day." The work was "to be subject to the inspection of the defendants by their engineer aforesaid, and was to be done at such times and in such order as the said engineer should direct." There were also other provisions in the contract upon which no question arose.

On the hearing before the referees, the plaintiff offered evidence as to the amount and value of the work done under the contract. The defendants objected to any other evidence of such amount and value than the estimates of the engineer under the contract. The referees admitted the evidence, and the defendants excepted. It was then proved that the amount of excavation, independent of hard pan and rock, was 5416 cubic yards. The plaintiff then offered evidence of the amount and

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value of the hard pan and rock excavation, insisting that the seven cents per cubic yard for "executing the digging," &c. as provided for in the contract, did not cover this species of excavation. The defendants objected to the evidence on the ground that the written contract controlled the price, and did not admit of any other rate of compensation than the seven cents per cubic yard. The referees admitted the evidence, and the defendants excepted. It was then proved, that the amount of hard pan excavation was 5146 cubic yards and 12 feet, and of rock excavation 491 cubic yards and 21 feet; that the hard pan excavation was worth 75 cents per yard, and the rock \$1,00 per yard. It was also shown that seven cents per yard was the lowest price for common earth excavation. There was some evidence tending to show that when the plaintiff entered into the contract, he might, with ordinary attention and diligence, have ascertained the character of the ground to be excavated; and there was also evidence tending to a contrary result.

The referees reported in favor of the plaintiff the sum of \$4743,43, which included the above quantities of hard pan and rock excavation at the prices proved. The defendants moved, in the superior court, to set aside the report, which motion was denied, and judgment rendered for the amount reported and costs. The defendants then removed the cause by writ of error into the supreme court, where the judgment of the superior court was reversed, and a new trial ordered in that court. The plaintiff brings error to this court.

S. Sherwood, for plaintiff in error. The price for "executing the digging," which means, according to the popular sense, the loose excavation which may be done with a spade or shovel, was seven cents per cubic yard, and was not intended, nor did it in fact include "rock" or "hard pan," the first worth \$1,00, and the latter 75 cents, per cubic yard.

The position taken by the defendants, that "the engineer's estimate of the amount and value of the work should be taken instead of other proof," cannot be sustained, inasmuch as no

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provision to that effect was contained in the contract; and estimates were never made satisfactory to the plaintiff, or founded upon a knowledge of the work by the engineers.

The objection that no proof of the value of hard pan or rock excavation could be given with a view to compensation, on the ground that the contract did not admit of any extra compensation therefor, was not well taken.

The words, in the instrument, "executing the digging," shows the sense of the parties, and refers to the lowest grade, or common earth excavation, which only could be done for seven cents per yard.

It was competent to show by parol proof, that neither rock nor hard pan were included in the terms "executing the digging," by showing the usage in relation to the allowance for either when found, and by showing the value of the lowest grade, or earth excavation, from which the meaning of the parties could not be mistaken.

Evidence of usage, or course of trade, where the contract is to be carried into effect, is admissible to explain the meaning, and remove the doubt.

Ambiguous terms may be explained by proving the facts and circumstances tending to show the sense in which the terms were used. (*Doe v. Burt*, 1 T. R. 701; *Coit v. Com. Ins. Co.* 7 John. 385; *Powell on Cont.* 378; 3 *Kent's Com.* 556; *Story on Conf. of Laws*, 226, 233.)

Willis Hall, for defendants in error. (1.) The testimony as to the amount and value of the work done under the contract was improperly admitted, as that was to be paid for on the estimate of the engineer; and he having made a final estimate, the same is conclusive. (2.) The evidence as to the value of the hard pan and rock excavation, was improperly admitted.

The terms of the written contract include excavation of every kind, and the price of seven cents per cubic yard is stipulated to be "in full compensation" therefor.

There is nothing in the contract to indicate that the word

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"excavation" is used in any special sense. The written contract must therefore govern as to the rate of compensation for that labor. (*Robertson v. French*, 4 East, 135; *Delaware & Hudson Canal Co. v. Dubeis*, 15 Wend. 89, 95.)

(3.) It was the duty of the contractor to have ascertained the nature of the soil before entering into the contract. Ordinary diligence would have enabled him to do so.

JEWETT, Ch. J. The principal question in dispute between the parties is, whether the plaintiff had a right to show and recover the real value of excavating that portion of the trench composed of "hard pan," or "rock." The plaintiff offered such evidence, which the referees admitted, although objected to. The plaintiff insists that for excavating such portions of the trench no price was agreed upon between the parties, and that therefore he is entitled to show its value, and recover accordingly; that the contract merely contemplates and provides for excavating common earth. The argument for the plaintiff is founded upon the idea that the term *digging*, as applied in the contract, means nothing beyond removing common earth, and does not include hard pan or rock, or at least the term is ambiguous as applied, and therefore may be explained by proof of facts and circumstances tending to show the sense in which it was used by the parties in this contract.

I am unable to see any ground for such argument. The plaintiff expressly contracts to furnish all the materials and labor necessary to complete the excavation of the trench in the manner set forth, and as a *full compensation* for the *excavation aforesaid*—that is, for opening the trench described—it is agreed that he should be paid by the defendant, seven cents per cubic yard.

The term "for executing the digging," in the paragraph describing the rate of compensation, is plainly used as synonymous with the term *excavation* in the paragraph immediately preceding it, and the same term is used in the specification showing the manner in which the work was to be done.

It may have been a hard and ill advised contract on the part

of the plaintiff. The substance to be dug out to make the trench, may have been composed of materials unexpected by him, rendering it worth tenfold more to do the work than he expected, but that furnishes no valid ground to say that the *digging* contracted for was not to be of any other material than common earth.

The contract, under the head excavation, called for the opening of a trench of the prescribed *width* and *depth*, through whatever substances should be met with on the line agreed upon; and full compensation for that part of the work is agreed upon under the terms "for executing the digging," at the rate of seven cents per cubic yard. Therefore I am of opinion that the referees erred in admitting parol evidence of the value of that work. I think it is fixed by the written contract, which must, in this case, control the rate of compensation. An objection was made by the defendant that it was not competent for the plaintiff to prove the number of yards excavated, in doing the work, by any other person than the engineer. It is supposed that the parties have, by their contract, confined the proof as to the *amount* of the work to the estimates of the defendants' engineer. I do not think that its terms can receive such construction. The referees were right therefore in admitting the evidence offered as to the amount of the work. I am of opinion the judgment of the supreme court should be affirmed.

Judgment affirmed.

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158	659

SPIES vs. GILMORE and others.

Where a note, specifying no place of payment, was made and endorsed in the state of New-York, but the maker and endorser resided in a foreign country, and continued to reside there when the note fell due, their place of residence being known to the payee and holder, both when the note was given and when it matured; *held*, that presentment of the note to the maker, demand of payment from him, and notice to the endorser, were necessary in order to charge the endorser.

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F. being indebted to S., in order to obtain further time for payment, executed to him a note payable to the order of S. Before the note was delivered to S., G. endorsed it. The purpose for which the note was made being known to him, and it being part of the arrangement that he should become security for F. Held, that G. was liable only as endorser, and not as a joint maker, or as a guarantor.

The case of *Hall v. Newcomb*, in error, (7 *Hill*, 416,) referred to, and the doctrine there established, reaffirmed.

ON error from the supreme court. Adam W. Spies sued Robert Gilmore, John Jewett and George W. Jewett, in the superior court of the city of New-York, upon a bond given in a proceeding by attachment instituted by Spies against Gilmore as a non-resident debtor. The bond bore date October 20th, 1841, and was executed by Gilmore as principal, and by the other defendants as his sureties. The condition of the bond was such, that the plaintiff's right to recover depended upon the question whether, at the time the proceeding was instituted, he was a creditor of the said Gilmore, and the facts relating to that question, as proved on the trial, were as follows: On the 16th of September, 1835, one John Furlong executed to the plaintiff his promissory note, as follows:

"\$530.07.

New-York, Sept. 16, 1835.

Six months after date, I promise to pay to the order of Mr. Adam W. Spies five hundred and thirty $\frac{7}{8}$ dollars, value received.

JOHN FURLONG."

The defendant Robert Gilmore was the first and only endorser on this note. At the time the note was given, Furlong was indebted to the plaintiff in the amount thereof for goods sold to him by the plaintiff, at a credit of six months, which had expired. Furlong applied for a further credit of six months, and proposed to give the defendant Gilmore as security. The plaintiff agreed to the proposal. This arrangement took place in the presence of Gilmore, and in pursuance thereof Furlong executed and Gilmore endorsed the above note. The note was made and endorsed in the city of New-York, but both the maker and endorser then resided at Matamoras, in Mexico, and continued to reside there when it came to maturity; and their residence was known to the plaintiff. There was some

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evidence tending to show that when the note fell due the plaintiff wrote to the maker and endorser at Matamoras, stating the non-payment of the note, and requesting payment, but there was no evidence that the note was presented to the maker or any other demand made upon him than by the letter aforesaid.

The superior court ruled, and so charged the jury, that under the circumstances of the case, as they appeared in the evidence, no demand and notice were necessary to enable the plaintiff to sustain the action. The defendants excepted. A verdict and judgment for the plaintiff were had in the superior court. The supreme court, on writ of error, reversed such judgment. (*See 1 Barbour's Sup. Court Rep.* 158.) And from the decision last mentioned the plaintiff brings error to this court.

Charles O'Connor, for the plaintiff in error. Furlong the maker, and Gilmore the endorser, having been both residents of Mexico, a foreign country, at the maturity of the note, the plaintiff was entitled to recover without evidence of demand or notice. (2 *Burr.* 1077; *Brown v. Harraden*, 4 *T. R.* 148; 1 *R. S.* 768, § 1; *Chitty on Bills*, 460, 485, note c, 8th Am. ed.; *Magruder v. Bank of Washington*, 9 *Wheat.* 598; *Anderson v. Drake*, 14 *John.* 117; *Hepburn v. Toledano*, 10 *Mart.* 643; *Story on Prom. Notes*, § 236; 1 *Dev. Law R.* 247; *Taylor v. Snyder*, 3 *Denio*, 151; 20 *John.* 102; 1 *id.* 94; 7 *T. R.* 242; *Co. Litt.* 210, B.; 3 *Cov. Powell on Mort.* 939, note u.; 2 *Smedes & Marsh.* 553; 8 *N. Hamp. Rep.* 413; 20 *Maine Rep.* 325; 1 *Bingh. N. C.* 151; *Consequa v. Fanning*, 3 *John. Ch. Rep.* 588; 17 *John.* 518; *Cox et al. v. United States*, 6 *Peters*, 203; *Story's Conf. Laws*, § 280; *Buckner v. Finley*, 2 *Peters*, 590; *ib.* 179, App. 2.)

The note ought to be held binding upon Gilmore as the joint and several note of himself and Furlong, or as a guaranty (*Hall v. Newcomb*, 3 *Hill*, 234, *S. C. in error*, 7 *id.* 420; *Labron v. Woram*, 1 *id.* 93; 2 *id.* 84; 4 *id.* 421; *Dean v. Hall*, 17 *Wend.* 217.)

A. Crist, for the defendant in error.

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BRONSON, J. There are a few cases in the books which hold, in effect, that a written contract of one kind may be turned into a contract of a different kind, by parol proof concerning the intention of the parties; that the endorser of a promissory note may, under certain circumstances, be charged as maker or guarantor; and that the guarantor of a promissory note may sometimes be charged as maker or endorser. Although these cases stand upon no principle, it has been a work of some time and difficulty to get rid of them. The court of errors was at first equally divided on the question; but after a second argument the court decided by a pretty strong vote to uphold contracts as they had been made by the parties, instead of making new contracts for them. (*Hall v. Newcomb*, 3 *Hill*, 233, and 7 *id.* 416, *S. C. in error*, and *note*, p. 426; *Seabury v. Hungerford*, 2 *id.* 80; *Manrow v. Dunham*, 3 *id.* 587, *per Bronson, J.*) The work was not completed until after this proceeding had been commenced, and the case had been disposed of in the superior court. It is evident from the declaration that the plaintiff expected to recover on the ground that Gilmore might be charged as maker or guarantor. But the court of errors having overturned that doctrine, the plaintiff now seeks to uphold the judgment on another ground. He insists that as Furlong, the maker, lived at Matamoras, out of this state, and out of the United States, at the time the note fell due, no demand of payment from the maker, nor notice of non-payment, was necessary for the purpose of charging Gilmore as endorser. No such exception to the general rule, which requires demand and notice, has ever been sanctioned by the courts; and *Taylor v. Snyder*, (3 *Denio*, 145,) is a case in point against the plaintiff. It is not pretended that the maker had absconded, or removed out of the state, after the note was made; nor that there had been any other change of circumstances to excuse the want of a demand. So far as appeared on the trial, the maker still continued to reside at Matamoras, in Mexico, where he resided when the note was given, as the plaintiff well knew. The only excuse which has been offered for not making demand is, that it would have been incon-

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venient to go or send to Matamoras for that purpose. It is often inconvenient to present the note for payment when the maker and holder both reside in the same state; and yet when the maker has a known place of residence, and there has been no change of circumstances after the giving of the note, mere trouble or inconvenience to the holder has never been held a good excuse for omitting the demand. And this is so, however wide asunder the maker and the holder may live. If the plaintiff wished to avoid the inconvenience of sending to Matamoras, he should have made the note payable in New-York, or got an endorsement with a waiver of demand. He has no right to change the contract which the endorser made, for the purpose of promoting his own convenience.

If the demand could be dispensed with, the endorser was still entitled to notice of the default of the maker, and that the holder looked to the endorser for payment; and there is no color of excuse for omitting to give notice. The giving of it would have cost the plaintiff no trouble, beyond sending a letter by the next ship which sailed for Matamoras, where the endorser lived. The plaintiff attempted to prove that this was done; but there was a defect in the evidence. If there had been proof enough to carry the cause to the jury on that point, it would not aid the plaintiff; for the question was not left to the jury. The judge instructed them that neither demand nor notice was required by law to entitle the plaintiff to his action. The truth evidently is, that the cause was tried upon the doctrine which has since been finally exploded, that Gilmore might be charged as maker or guarantor of the note. He was in fact endorser, and nothing else; and as such he was entitled to notice.

I am of opinion, upon both grounds, that the reversal by the supreme court (1 *Barb.* 158) was correct, and that their judgment should be affirmed.

JEWETT, Ch. J. The case of *Hall v. Newcomb*, (7 *Hill*, 416,) is in point to show that Gilmore cannot be made liable to Spies, as guarantor or maker of the note. The material question

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then is, Was there proof given on the trial, sufficient to charge him as *endorser*? The evidence showed that both the maker and endorser at the time of making and endorsing the note, as well as at the time of its maturity, were residents of and doing business at Matamoras in Mexico, and that these facts were known to Spies, who at the same time resided in New-York, where the note was drawn, dated and endorsed. There was no evidence given to show either a demand of payment of the maker, at maturity, and notice of non-payment to the endorser, or of any facts constituting an excuse for omitting to make such demand, or any efforts to make it and give such notice, other than to show the residence of the maker and endorser to have been in Mexico, a foreign country. It is insisted in behalf of the plaintiff, that upon that ground the law excuses any demand and notice. The general rule of law is, that when a promissory note is not made payable at any particular place, in order to charge the endorser, payment must be demanded of the maker personally, or at his dwelling house, or other place of abode, or at his counting house or place of business. The note in question is not made payable at any particular place. There are, however, exceptions to this general rule, by which any demand is dispensed with. It is a question of diligence, and if a demand is found to be impracticable, proper efforts for that purpose having been made, the endorser will still be held liable, due notice having been given to him by the holder. These exceptions are enumerated in the opinion of the court delivered by Mr. Justice Beardsley in *Taylor v. Snyder*, (3 Denio, 151,) and embrace cases under the following circumstances: 1. When the maker has absconded, that will ordinarily excuse a demand; and notice of the fact is sufficient to hold the endorser. 2. When the maker is a seaman on a voyage, having no domicile in the state, the endorser is liable without a demand being made; but if he has a domicile in this state, although he be absent on a voyage, payment must be demanded there. 3. Where the maker has no known residence or place at which the note can be presented for payment. 4. Where a note is made by a resident of the state, who, before it is payable, removes from the

state and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker.

These exceptions to the general rule, as Judge Beardsley remarked, it will be seen, all rest on peculiar reasons. In the first, the maker has absconded; in the second, he is temporarily absent, and has no domicile or place of business within the state; in the third, his residence, if any he has, cannot be ascertained; while in the fourth, he has removed out of the state and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse, occurs *subsequently* to the making and endorsement of the note; and it is this new and changed condition of the maker, *and that only*, by which the endorser stands committed, without a regular demand. And this is just: for it is but reasonable to suppose that neither party, when the note was given, looked for this new and changed condition of the maker, and that each contracted upon the supposition that no such change would take place.

It is obvious that the case at bar is not within either exception to the general rule dispensing with a demand and notice. No change in the condition of either party has taken place since the note was made and endorsed. The maker and endorser, I repeat, respectively had a residence in Mexico at the time the note was made in New-York, which remained unchanged at the maturity of the note, and which was known to the plaintiff at each period of time. If the exception now insisted upon is made, it must rest upon some principle not hitherto recognized by any rule of law, as I think is abundantly shown by the opinion in the case to which I have referred.

I cannot assent to the truth of the position assumed, that because the maker and endorser of a promissory note at the time of the making and endorsing reside in another state or foreign country, the endorser may be held liable without any demand being made on the maker; especially when such residence was known to the holder at the time the note was made and has

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not been changed before the maturity of it. And in this there is no injustice: for it is but reasonable to conclude that each party contracted upon the supposition that the holder should make a demand of payment on the maker at maturity, at the place of his residence, and if not paid give notice to the endorser, or else a *place* as well as time of payment would be stipulated for in the note itself. To hold that a demand and notice can be dispensed with on the ground that the maker and endorser resided in a foreign country at the time of the making and maturity of the note, would, in my judgment, be nothing short of judicially changing the terms and legal effect of the contract between these parties. I think the judgment of the supreme court should be affirmed.

GARDINER, *J. dissenting*. I cannot assent to the opinion, that a demand of the maker was necessary in this case. By his endorsement, the defendant contracted that if the note was duly demanded of the maker and not paid, *or if* after the exercise of *due diligence* no such demand could be made, he would on receiving due notice pay the amount to the endorsee or holder. (14 *John*. 117.) The question is whether due diligence required that a demand should be made of the maker, under the circumstances disclosed by the evidence.

In *Anderson v. Drake*, (14 *John*. 114,) it was held that where the note is not payable at a particular place, and the maker has a known and permanent residence within the state, the holder is bound to make demand at such residence. The rule applies where there has been a change of residence by the drawer subsequent to the making the note, as well as to other cases. In *McGruder v. Bank of Washington*, (9 *Wheat*. 601,) it was decided that where the maker of a note had removed into another state subsequent to the making, no demand was necessary. So also in *Anderson v. Drake*, (*supra*, 117,) and in *Taylor v. Snyder*, (3 *Denio*, 146.) Justice Beardsley, in delivering the opinion of the court, after a very able review of all the cases, came to the conclusion that demand and notice must be given where the drawer of the note at the time of the making

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and when it fell due, had a known residence in *one* of the *United States*—the payee residing and the note being given in this state.

The question is now presented in a new form, whether the payee, in the exercise of due diligence, is required to follow the maker to a foreign country in order to make a demand.

If the legal effect of the contract of the endorser is as stated by the learned judge in *Snyder v. Taylor*, namely, that it requires a demand except in those cases where it "shall be found impracticable," the plaintiff was not excused in this instance, since it was possible to have demanded payment of the maker when the note matured. But I apprehend that this is stating the condition of the endorser's liability a little too broadly. In *McGruder v. Bank of Washington*, it was neither impossible or inconvenient to have demanded payment, as the maker lived, after his removal from the district of Columbia to the state of Maryland, only nine miles from the holder. The court determined, as matter of law, that due diligence did not require a demand under such circumstances. They say, "on this point there is no other rule that can be laid down which will not leave too much latitude as to place and distance." The rule was adopted as a rule of convenience, and not on account of its abstract justice. The reasoning of the court is applicable to the case before us. In the absence of direct authority, we are called upon not to make a new *exception* to the general rule, but to apply that rule to a new class of cases. Expediency, public convenience, it seems to me, require that the necessity of a personal demand should be confined to cases where the maker resides within the states or territories of the Union. It is difficult to prescribe any other rule which will not leave "too much latitude as to place and distance," and of course be fluctuating when it should be certain. Instances will readily occur to every one, in which the making of a demand in a foreign country would be attended with little inconvenience, and others in which it would be impracticable. Between these extremes there is a wide interval which would be opened to litigation, which sound policy requires to be closed. The case of *Hepburn v. Toledano*, (10 *Martin's R.* 643,) and the remarks of Judge

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Story in his treatise, are opposed to the extension of the privilege of an endorser further than they have been carried in *Snyder v. Taylor*, even if the criticism of Judge Beardsley upon that case is in all respects correct. Looking then to the nature of the instrument in question, as essentially domestic in its origin and uses; to public convenience, which demands certainty in the general rule, rather than strict equity in special cases; and to the extent of the country under the government of the United States, I have come to the conclusion that no demand was necessary in this case in order to charge the endorser.

Judgment affirmed.

NOBLE and others vs. HALLIDAY.

By statute (2 R. S. 464, §§ 41, 42; *id.* 469, §§ 67, 68, 72; *id.* 43, § 12) whenever a receiver of an insolvent corporation "*shall, sworn by his own oath or other competent proof,*" that any person is indebted to the corporation, or has property of the corporation in his custody or possession, the officer to whom the application is made shall issue a warrant to bring such person before him for examination. Under this statute it is sufficient for the receiver, who applies for a warrant, to swear to the facts *on information and belief*.

Accordingly, where the receiver of an insolvent corporation applied for a warrant under the above statute, and showed the facts only by his own oath on his information and belief, and a warrant was issued upon which the person proceeded against was taken and brought before the officer; *held*, in an action brought by such person against the receiver and others acting under the warrant for an assault and battery and false imprisonment, that the warrant was a good justification.

Under the above statute, a person having in his custody, *as administrator* of a deceased person, effects of the corporation, or indebted as such administrator, is liable to be proceeded against; and where the sworn petition, on which the warrant was granted, stated that such person had property of the corporation in his custody, either individually or *as administrator*, &c. *held good*.

On error from the supreme court. Halliday sued Noble, Livingston and Lamberson, in the superior court of the city of New-York, for an assault and battery and false imprisonment. On the 20th of July, 1841, Noble, one of the defendants, was appointed by the court of chancery receiver of the property and

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effects of The New-York Northern Fire Insurance Company. On the 24th of November, 1841, Noble, as such receiver, presented a petition to the recorder of the city of New-York, and obtained from that officer a warrant directed to the sheriff of that city and county, commanding him to bring the plaintiff before the recorder for the purpose of being examined. The warrant was duly served and the plaintiff held in custody under it; and that was the assault, &c. for which the action was brought. The question presented by the pleadings, on demurrer, was, whether the petition and oath annexed thereto, on which the warrant issued, were sufficient to authorize the issuing of such warrant. The principal facts required to be shown to the officer, were stated and sworn to on the *information and belief* merely of the petitioner. That was one objection to the validity of the proceeding. Another was, that the petition stated that the plaintiff Halliday, either individually *or as administrator* with the will annexed, of Robert Halliday deceased, (without stating which,) had in his hands and custody property and money which belonged to the petitioner as such receiver; and it was insisted for the plaintiff that he was not liable under the statute to be proceeded against as an administrator, and therefore that the petition being in the alternative did not give the officer jurisdiction. The superior court gave judgment against the plaintiff; which, on error, was reversed by the supreme court. (1 *Barb. Sup. Court Rep.* 137.) The defendants bring error into this court. The statutes defining the powers of Noble as such receiver, and under which the proceeding in question was instituted, are material to a proper understanding of the case; and these are sufficiently set forth in the opinion of RUGGLES, J.

L. Livingston, for plaintiffs in error.

E. Sandford, for defendant in error.

RUGGLES, J. The question raised by the pleadings in this case is, whether the petition presented by Noble, the receiver of

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The New-York Northern Insurance Company, verified by his own oath as to the principal facts, on his information and belief, was sufficient to give the recorder jurisdiction to issue the warrant. If it was, the arrest of Halliday was legal, and his action, founded on the supposed illegality of the arrest, must fail.

The legality of the warrant is here drawn in question in a collateral action ; and for the purpose of maintaining the action it is necessary to show not merely that the recorder's decision in granting the warrant was erroneous, but that it was absolutely void.

The authority of the receiver to apply for and obtain the warrant against Halliday will be found in the following sections of the revised statutes, by which the receiver of insolvent corporations is charged with like duties and clothed with the same powers as are by another section given to trustees and assignees in cases of insolvency. (2 *R. S.* 464, §§ 41, 42 ; *id.* 469, §§ 67, 68, 72 ; *id.* 35, § 1.) The nature and extent of the powers and duties of trustees of insolvent debtors will appear by 2 *R. S.* 40, 41, 42, §§ 6, 8, 12. The latter section is that under which the warrant issued. It is as follows :

“ § 12. Whenever the trustees shall show by their own oath or other competent proof, to the satisfaction of any officer named in the first section of the seventh article of this title, or of any judge of a county court, that there is good reason to believe that the debtor, his wife, or any other person, has concealed or embezzled any part of the estate of such debtor, vested in the said trustees ; or that any person can testify concerning the concealment or embezzlement thereof ; or that any person who shall not have rendered an account as above required, is indebted to such debtor, or has property in his custody or possession, belonging to such debtor ; such officer or judge shall issue a warrant, commanding any sheriff or constable to cause such debtor, his wife, or other person, to be brought before him at such time and place as he shall appoint for the purpose of being examined.”

Upon a careful examination of the case I am satisfied that the judgment of the supreme court was erroneous ; and that the

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error arose mainly from a misconception of the nature of the proceeding against Halliday. It was in substance a proceeding to obtain his testimony as a witness, and not a proceeding against him as a party for relief by judgment or decree. It is true he was an interested witness and was called to testify against his interest, and in that respect he stands in the situation of a defendant in a bill of discovery, where the sole object of the proceeding is to obtain the defendant's evidence under oath. The proceeding authorized by the statute appears to have been intended as an informal, but prompt and effective substitute for the tedious and expensive process on a bill of discovery in a court of equity. The necessity and utility of the proceeding are too obvious to require elucidation. The property of an insolvent corporation is usually in the hands of the officers and agents under whose management it has become insolvent. They are frequently its largest debtors; and the power of compelling them and all others to disclose its condition, and of ascertaining by that means where its property is, in whose hands, under what claim or pretence it is held, and who are its debtors, is indispensable to the interest of its creditors for whose benefit it is to be collected and distributed by the receiver.

It seems to have been supposed that an executor or administrator cannot be called upon to testify, under this statute, in relation to a debt due from his testator or intestate, or in relation to property in his hands claimed in his representative capacity. I am at a loss to know whence that idea could have arisen. Certainly not from the statute itself. If the administrator have in his custody and possession property belonging to the corporation, it is immaterial by what right he claims it. He is bound to testify in relation to it. And if as administrator he is indebted to the corporation, there is nothing in the statute to excuse him from disclosing, under oath, what he knows in relation to such indebtedness. Such a case is embraced within the general terms of the 12th and 13th sections of the statute.

The cases of *Jackson v. Walsworth*, (1 *John. Cas.* 362,) and *Hinds' case*, (9 *Wend.* 465,) have no application to this pro-

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ceeding for discovery. Those cases relate to attachments against the property of an absconding debtor under 2 R. S. 3, 4. Proceedings under that statute have no resemblance or similarity to the proceedings against the debtor of an absconding debtor to compel him to testify. To authorize an attachment against an absconding debtor, the creditor must, by the express terms of the statute, have a demand against him personally. (2 R. S. 3, § 3.) But the power to examine those who have his property, or who owe him money, is not thus limited. The statute would be exceedingly defective if it exempted those who owe in a representative capacity from liability to answer like all others as to their indebtedness. Executors and administrators are not thus exempted upon a bill in equity for a discovery, and the power under the statute to call for a disclosure is as ample as under such a bill. The receiver therefore was right in calling on Halliday to testify in relation to property that he held, or money that he owed the corporation as administrator with the will annexed of a deceased person. In that character he was liable to an action at law by the receiver; and the power of discovery was undoubtedly intended to be co-extensive with the right to sue.

It constitutes no good objection to the petition for the warrant, that the grounds on which it was demanded were stated in the alternative. If it had been a declaration in a suit at law, or an indictment, or a proceeding under the act to abolish imprisonment for debt, by which Halliday might have been committed to jail until he paid a debt, the objection would have been a good one. In these cases the plaintiff, or party prosecuting, is supposed to know the ground of his proceeding; and he is bound to state it with precision, in order that the defendant may know what he is to controvert; for he controverts at the peril of his property or his liberty. But this was a proceeding of a different character. The object was inquiry, and nothing else; and the receiver could not be required to state positively facts which he did not know, and which he could not be supposed to know until the inquiry should be answered. In bills of discovery the complainant's allegations are usually stated in the

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alternative. They are so stated in judgment creditors' bills, and in others of the like nature, although relief as well as discovery is sought. No hardship was imposed on Mr. Halliday in compelling him to answer allegations thus stated. Nor is there any just objection on his part to the discovery, at the same time, of matters which might affect him individually, and of others which might affect him in a representative capacity. The statute authorizes an informal discovery; and it is much better that it should all be done at one time and under the same process, than to have two distinct applications and warrants.

The remaining question as to the sufficiency of the petition is, whether the facts set forth in it were properly verified. It was sworn to by Noble, in the form heretofore prescribed in the court of chancery for the verification of bills of discovery, that is to say, as to the principal facts on his information and belief. In determining this question the statute under which the warrant issued must be our guide. This statute (2 R. S. 43, § 12,) does not require the receiver to establish the truth of his petition by positive proof. It does not require him to give positive proof of the facts and circumstances from which its truth is to be inferred. It requires him to show to the satisfaction of the officer *that there was good reason to believe* that Halliday was a debtor to the corporation, or that he had its property in his possession; and it made the receiver's own oath evidence for that purpose. It also authorized "other competent proof" instead of the oath of the party; but the makers of the statute could not have intended proof competent to establish the facts in a legal sense, as before a jury. The facts are not required to be so established; and proof sufficient to create a rational belief is all that the language calls for, and this may fall far short of that which is necessary to authorize a verdict. In all other respects the statute is silent with respect to the nature and quality of the proof on which the officer is to exercise his judgment.

By the act of 1811, for relief against absconding debtors, from which the provisions in the present statute are taken, (*see* 1 R. L. 160, § 12,) a warrant in a case like the present might

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have been issued by any justice of the peace, upon the application of the trustees against "any person known or *suspected* to detain any part of the estate or to be indebted to it." The present statute has taken this power away from justices of the peace, and has conferred it upon officers of a higher grade. (2 R. S. 34, § 1.) And instead of allowing the warrant against any person whom the trustees might *suspect* to be indebted to the estate, it is now allowed, wherever the officer has "good reason to believe," that any person is so indebted. But the object and policy of the law is unchanged; and it is apparent that the legislature intended to permit examinations of this nature to be made at the instance of receivers and trustees upon very slight proof; a shade stronger, indeed, than mere suspicion; but it is clear that legal certainty is not required. It would have been absurd to require it, or to suppose it could be had until after the arrest and examination.

The proof in this case was that the receiver was informed and believed that Halliday was indebted to the corporation and had its property in his possession. According to the case of *Fitch, an absent debtor*, (2 Wend. 298,) this was sufficient. In that case the creditor was required by the statute, (1 R. L. 163, § 23, *act of 1801*,) to make proof by two witnesses to the satisfaction of the judge, of the residence of the debtor out of the state. Two witnesses swore to *their belief* that he resided out of the state, without setting forth the grounds of such belief. The proof was held to be sufficient; and in the case of *Haynes, ex parte*, (18 Wend. 614,) Mr. Justice Cowen says, "on such a statute, with the high authorities to which I have referred, I think I should not hesitate in receiving the oath of mere belief." The belief of the applicant was, in that case, regarded by those eminent judges sufficient to *establish a fact* to be proved to the satisfaction of the judge. The statute, in the present case, does not require any fact to be established by proof; it demands only that the judge shall be satisfied that there is good reason to believe the fact.

When the warrant against Halliday was issued, the officer had before him, as the basis on which his belief might be found-

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ed, not only the belief of the receiver, but the information on which the receiver's belief was founded. The case as it existed in the mind of the receiver, was laid before the officer. Information constitutes, in many cases, ground of rational belief. In our daily and most important transactions we act on belief resting on that foundation only. The fact that this information had been given to the receiver was legally proved. The truth of the information was not proved; but I think the recorder might properly take notice of the fact that such information had been given, and if it operated on his judgment as it seemed to have affected the mind of the receiver, by creating a belief that Halliday was indebted to the corporation, it was all the act required. The act does not require the certainty of legal conclusion, as to the facts on which the application is grounded.

In regard to the proof on which the warrant, in cases like the present, is to issue, the statute differs entirely from that which authorizes attachments against absconding debtors; (2 *R. S.* 3, § 5;) and from that which authorizes attachments and warrants in justices' courts. (2 *R. S.* 229, § 19; *Laws of 1831, ch. 300, § 35.*) In those cases the facts and circumstances to establish the grounds on which the application is made must be stated and proved. Such facts are made the only evidence on which the magistrate can act, and the belief of the applicant as one of the ingredients of proof is excluded. It differs also from that part of the act to abolish imprisonment for debt, which authorizes warrants against fraudulent debtors. (*Laws of 1831, ch. 300, §§ 3, 4.*) The party applying for a warrant under that act must give evidence establishing one or more of the frauds specified in those sections, and facts must be shown to satisfy the judge that the fraud actually exists; and not merely to show there is reason to believe that it exists. The decisions, therefore, as to the proof required under these statutes, are not applicable to the present case. The objects and consequences resulting from the granting of process under those statutes are entirely different from the object and purpose of the warrant in the present case. They are proceedings to obtain a judgment

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or decree. This is to obtain evidence. There he must controvert the allegation or pay the debt. Here he is discharged from the process on giving his testimony.

I am unable to perceive any good reason, independent of the statute, why the proof to compel Halliday to testify should be any stronger or more formal than that on a bill of discovery, or indeed than that on which an attachment is granted against an ordinary witness for non-attendance under a subpoena. Such a witness may be subpoenaed without any proof of his materiality, and is bound to attend; he is liable to a penalty of fifty dollars for non-attendance. (2 R. S. 400, § 43.) An attachment issues against him on proof of his having been served with a subpoena and of his failure to attend. (*Id.* 441.) And where he is summoned to appear before any judge or officer to give testimony or have his deposition taken, such judge or officer, on his failure to attend, and on proof of service of the summons and of such failure, is required to issue his warrant to bring him before the officer to be examined; and for refusing to be examined when brought before the officer, the witness is committed to jail until he submits. No proof of the materiality of his testimony, or of the necessity of taking it, is required.

The statute, however, under which the warrant issued in this case, must govern. But if there be any doubt about its meaning, as to the proof required to obtain the warrant, it should receive that construction which is most in conformity with proceedings having the like nature and object. I am satisfied that the petition and warrant were in all respects legal. They constituted a valid defence to the action brought by Halliday against those who acted under them.

But it seems to be supposed that the plaintiff is, nevertheless, entitled to judgment, on the ground that Noble, by his demurrer to the plaintiff's replication to his second plea, admitted on the record that Noble did not show to the recorder "good reason to believe that Halliday was indebted to the corporation," &c.

For the purpose of understanding the force of this objection,

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it is necessary to make a brief statement of the pleadings between Halliday and Noble.

1. Halliday declared against Noble for an assault and battery, and false imprisonment. 2. Noble pleaded a justification under the warrant issued by the recorder of New-York, setting it forth in substance. 3. Halliday replied, setting forth at full length Noble's petition to the recorder for the warrant, and concluded his replication with a traverse denying that Noble "had shown, by his own oath, to the satisfaction of the recorder, that there was good reason to believe that the plaintiff, Halliday, was indebted to the corporation, or had its property in his possession." To this replication Noble demurred, and Halliday joined in demurrer.

It is now contended that by this demurrer Noble admitted that he did not show on his oath, to the satisfaction of the recorder, that Halliday was so indebted, &c. But this is a mistake. Halliday's replication is bad, because it puts his case upon a supposed defect in the petition, which defect does not exist. The petition for the warrant was good; and the plaintiff, Halliday, by setting it forth in his replication, showed that Noble had made all the proof necessary to entitle him to the warrant from the recorder. The traverse by Halliday was repugnant to the previous part of the replication. It denied what he had just previously shown was true, to wit, that Noble had made the necessary proof to obtain the warrant. Noble was right in demurring. Halliday had shown in his replication all that was necessary to Noble's defence. If the traverse was not a contradiction of the matters of fact previously stated in the replication, it was nothing but a denial of the legal effect of the petition for the warrant. This was a question of law, and not traversable. It is a familiar principle that a demurrer confesses nothing except that which is well pleaded.

The cases of Livingston and Lamberson are governed by the same principles which are applicable to that of Mr. Noble. They are alike in all those respects in which the sufficiency of the defence is questioned.

The special pleas would have been bad on special demurrer,

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on the ground that each attempts, by the averment that the acts mentioned in it "are the several trespasses mentioned in the declaration," &c. to make that an answer to all the counts which is in fact an answer to one count only. But by replying, the plaintiff has lost the benefit of that objection. (1 *Ch. Pl.* 450, 559, 7th *Am. ed.*; 7th *Lond. ed.* 429, 553; 23 *Wend.* 488; *Arch. N. P.* 497, *Lond. ed. of 1845.*)

On the whole, the defence set up by the defendants under the recorder's warrant, appears to be a good one; and to have been substantially well pleaded.

The judgment of the superior court was not erroneous. That of the supreme court should be reversed.

JEWETT, C. J., and GARDINER, J., also delivered opinions in favor of reversing the judgment on similar grounds.

BRONSON, J. (dissenting.) I cannot agree in the result to which a majority of my brethren have arrived. This is not merely a question about the examination of a witness. It is a question of personal liberty. The plaintiff has been arrested; and, as I think, without lawful authority. The necessary facts were to be shown, to the satisfaction of the officer, by the oath of the receiver, "or other competent proof." (2 *R. S.* 43, § 12.) *Information and belief* that a man owes a particular debt, or that he has money or property in his hands belonging to another, are no proof whatever of the fact: especially where as in this case, the deponent tells who gave him the information, and assigns no reason for not producing the affidavit of his informant. The recorder had no right to be satisfied without some proof; and there was none at all.

I do not doubt that the defendants acted honestly, and without any improper intentions; but that is not enough where a man has been imprisoned without authority.

Judgment reversed.

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TAYLOR vs. MORRIS.

A testator, by his last will and testament, appointed three persons his executors, and authorized them, or the survivor of them, to sell and convey any part of his real estate, "*in case they should find it proper or most fit in their opinion,*" to sell the same for the purpose of paying his debts. Two of the executors neglected to qualify, and never acted as such. The other executor duly qualified, and took out letters testamentary in his own name only, and subsequently sold and conveyed a portion of the testator's real estate for the purpose specified in the will; *held*, that the power contained in the will was well executed, and that the conveyance was valid.

It seems, that the statute, (3 R. S. 109, § 55,) which provides, that, where real estate is devised to executors to be sold by them, or is ordered by any last will to be sold by them, and any of the executors neglect or refuse to qualify and act as such, the sale may be made by the executor or executors who take upon themselves the execution of the will, applies as well to *discretionary*, as to *peremptory* powers of sale.

EJECTMENT, brought by Andrew C. Morris against Robert L. Taylor, in the New-York common pleas, for an undivided fourteenth of a lot of land in that city. On the trial in the common pleas the case was this: Andrew Morris, the grandfather of the plaintiff below, died in 1828 seized in fee of the whole of the premises in question, having first made and published, in due form, his last will and testament, as follows:

"I Andrew Morris, of the city of New-York, do make this my last will and testament, revoking any I may have heretofore made. I direct my executrix and executors, hereinafter named, to pay my just debts out of my estate. I give my wife Ellinor all the silver plate and household furniture of every kind and description that I may be possessed of, together with one third of my personal property, leaving also to her her right of dower in my real estate. I give one half of the remainder of my estate, real and personal, to my daughter Margaret E. Willcocks, the wife of Lewis Willcocks, and to her heirs and assigns. And I give the other half of the remainder of my estate, real and personal, to the children of my son Thomas A. Morris, whom he now has or hereafter may have, to be divided equally among

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them. I hereby appoint my wife Ellinor my executrix, and my son Thomas A. Morris, and my son-in-law Lewis Willcocks, to be executors of this will. *And I do hereby authorize them, or the survivor of them, to sell any part of my real estate, and give a deed or deeds for the same, in case they shall find it proper or most fit, in their opinion, to sell the same for the purpose of paying my debts.* And I hereby appoint my said son Thomas, guardian of his children during their minority, and in case he should at any time consider it best and proper for their interest to sell their part of my real estate, then I authorize him to sell the same, or any part of it, and give a deed or deeds for any part he may sell, and put the money arising therefrom at interest, and appropriate such interest, or any income of this devise, for the education, benefit and bringing up of his said children. In testimony," &c.

The plaintiff was one of seven children which Thomas A. Morris had at the death of the testator, and claimed an undivided fourteenth of the premises under the will. The defendant was in possession at the commencement of the suit, and claimed title under a sale and conveyance of the premises made by Lewis Willcocks, one of the executors named in the will. The will was duly proved as a will of real estate before the surrogate of the city and county of New-York, in March, 1833, and in July, 1834, the said surrogate granted letters testamentary to the said Lewis Willcocks. Ellinor Morris, the executrix, and Thomas A. Morris, the other executor, were not named in the letters, and never appeared, qualified, or acted as executrix and executor; but no formal steps were ever taken to procure their renunciation.

On the 17th of September, 1834, the said Lewis Willcocks, as sole acting and qualified executor, sold and conveyed the premises to Francis Salmon, who afterwards conveyed to the defendant. Ellinor Morris joined in the deed to Salmon for the purpose merely of releasing her right of dower in the premises, describing herself in the deed as the widow of Andrew Morris, but not as executrix. The deed recited, among other things, that she and Thomas A. Morris had declined to take upon

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themselves the execution of the will. It was admitted, on the trial, that the defendant's title was good, provided Lewis Willcocks had power under the will to sell and convey the real estate of the testator, without the concurrence of Thomas A. Morris, the other executor.

Upon these facts, the court of common pleas ruled, that under the will it was necessary that all the executors named should join in the conveyance in order to render it valid, and that as Thomas A. Morris had not joined in the conveyance to Salmon, the defendant had failed to make out a title. A verdict was accordingly taken for the plaintiff, on which judgment was rendered, and the supreme court on error affirmed such judgment. The defendant below brings error to this court.

Frederick R. Sherman, for plaintiff in error. The concurrence of Thomas A. Morris, the other executor, was not necessary to give validity to the deed. By statute, (2 R. S. 71, § 15,) every person named in a will as executor, and not named as such in the letters testamentary, shall be deemed superseded thereby, and shall have no power or authority whatever as executor. The mere will itself, therefore, does not in this state, as in England, make a person executor. He must appear and qualify, by taking the oath of office, and by taking out letters testamentary. A refusal or neglect to comply with these requisites, is, in effect, the same as a renunciation by record, of the trust. Thomas A. Morris and Ellinor Morris, not having complied with these requisites, are therefore to be considered as blotted out of the will, and this leaves Lewis Willcocks, in effect, the surviving executor. (*Roseboom v. Mosher*, 2 Denio, 63; *Sharp v. Pratt*, 15 Wend. 610; *Zeback's Lessee v. Smith*, 3 Bin. 69.)

The power in question was well executed under the revised statutes, (2 R. S. 109, § 55,) which declares, that when real estate is devised to executors to be sold, or where it is ordered to be sold by the executors, and any executor shall neglect or refuse to take upon him the execution of the will, then the sale, made by the executor who does take upon himself the execu

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tion of the will, shall be valid, as if all had joined. (*Roseboom v. Mosher*, 2 Denio, 63; *Franklin v. Osgood*, 14 John. 554; *Sharp v. Pratt*, 15 Wend. 610; *Bunner & Mannings, executors, v. Storm*, 1 Sand. Ch. Rep. 357; *Ogden v. Smith*, 2 Paige, 198; *Hertell v. Van Buren*, 4 Hill, 494; *Zeback's Lessee v. Smith*, 3 Bin. 69; 3 *McCord's Rep.* (S. C.) 29; 1 *Dev. & Batt.* 389; 3 *Munf.* 345, 347; 6 *Rand.* 594; 1 *Hammond*, 232.)

The executors in the will in question take as executors *virtute officii*, and not *nominatim*, as individuals. They are appointed to sell by their official description, and are to apply the produce of the sale officially; that is, to the payment of the testator's debts. The payment of debts is strictly an executorial duty, and the power to sell for that purpose is highly favored. (*Sug. on Pow.* 144; *Pow. on Dev.* 240; *Witherall v. Gartham*, 6 T. R. 396; *Jenk. Cent.* p. 44, case 83.)

The power contained in this will, viewed at common law, is not a mere naked power, but a power coupled with a trust, to wit, the payment of debts; and there being also some interest in the executors themselves, the case falls directly within the principle of *Franklin v. Osgood*, (14 John. 554.)

The judgment of the supreme court should be reversed with costs.

J. G. Ring, for the defendant in error. The conveyance by Willcocks to Salmon, having been made without the concurrence of Thomas A. Morris, his co-executor, was void, and passed no estate in the land to Salmon.

A power or authority given to two or more persons cannot, in the nature of things, be executed by a less number than the whole. It is true that at common law a distinction was made between what was termed a *naked power* and what was termed *a power coupled with an interest*. The former could not be executed without the concurrence of the whole number of persons to whom it was given, and if one died or refused to act, the power could not be executed. (*Co. Litt.* 112 b, 113 a, 181 b, *Shep. Touch.* 449, pl. 9; *Powell on Devises*, 292, 310.) The

latter might be executed by the survivor or by the person taking upon himself its execution ; (3 *Salk.* 277 ; 3 *Atk.* 714 ; 2 *P. Wms.* 102 ; 1 *Caines' Cas. in Err.* 15 ; 3 *Cowen's R.* 654 ;) but a careful examination shows that there is nothing in these rules which militates against the above proposition. To understand the meaning of the terms "naked powers" and "powers coupled with an interest," as here applied, it is necessary to go back to *common law definitions*.

"A naked authority," says Powell in his treatise on devises, "is where a man devises that his executors shall sell his land, or orders his land to be sold by his executors, or appoints A. and B., whom he makes his executors, to sell his land. *In all these cases the executors have only a naked power*, and after the death of the testator the freehold descends to the heir." (*Pow. on Dev.* 292, 3.) The same writer says, "If lands be *devised to the executors* to be distributed for the good of the testator's soul, in this case the freehold is in the executors after the death of the testator and not in the heir. *By this devise they have authority coupled with an interest.*" (*Id.* 301. See also *Sugden on Powers*, 129.)

These definitions render the reason of the rules alluded to perfectly intelligible. A *naked power to two* cannot in the nature of things be executed by *one*, because one is *not* two, and less than two does not satisfy the words of the donor. A *power coupled with an interest* can be executed by the survivor, &c. ; not indeed as a power, (and here lies the key to the whole difficulty,) because the same technical objection would here apply as to a naked power, that a *part* is not the *whole*. But the land being vested in all in *joint tenancy*, upon the death of one goes to the survivors by the *jus accrescendi*, (4 *Kent's Com.* 360,) and the *trust* (all powers whether naked or coupled with an interest were originally to direct uses and perform trusts,) (4 *Kent's Com.* 505, 314,) follows the land ; (2 *Story's Eq. Jur.* 288, § 976 ;) and a court of equity would compel the survivors to execute the trust ; and what a trustee may be compelled to do by suit he may *voluntarily do without suit*. (2 *Story's Eq. Jur.* 290, § 979.) The *power itself* actually becomes *extinct*,

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but the trust surviving, a *duty*, and consequently an *authority* to execute it also survives. The rule was precisely the same where one of the trustees refused to accept the estate, which in such case would vest in the one accepting. (3 *Paige*, 421.)

In the case before the court the power is a *naked* one ; but were it otherwise, and were the land vested in the executors, the survivor could not, without the express authority given in the will, execute the power, because *there is no trust connected with it which a court of equity could enforce*.

At common law, neither a naked power nor a power coupled with an interest could be executed by less than the whole while the whole *were living and had not rejected the trust*. (*Sinclair v. Jackson*, 8 *Cowen*, 544 ; *Bogert v. Hertell*, 4 *Hill*, 514.) In the present case, Thomas A. Morris had neglected to qualify as *executor*, but he had not rejected the *trust*. (*Sugden on Pow.* 138 ; *Judson v. Gibbons*, 5 *Wend.* 227 ; 4 *Hill*, 508 512 ; 21 *Wend.* 436.)

The revised statutes (1 *R. S.* 735, § 112,) provide " where a power is vested in several persons, *all must unite in its execution* ; but if previous to such execution one or more shall die, the power may be executed by the survivor or survivors. The conveyance of Willcocks is void under this provision of the statute.

The revised statutes, (*vol.* 2, *p.* 109, § 55,) has no application to a case like the present, because the land is not *ordered to be sold*. This statute is substantially a re-enactment of the statute 21 *Hen.* 8, (*see* 2 *Paige*, 198,) which statute applies to *naked powers*, as is shown by the recital " whereas divers sundry persons before this time *having other persons seized to their uses* of and in lands," &c. and was enacted to remedy the inconvenience of a strict construction of the common law, where one of the executors refused to intermeddle, by enabling the other executors, who accepted, to sell, and rendering their disposition valid. (*Powell on Dev.* 310 ; *Sugd. on Powers*, 139 ; 7 *Dana*, 8.) It was unnecessary to extend the statute to powers coupled with an interest, (that is, where the donee also has the legal estate,) because the executors in such case had full power at common law.

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The section of the revised statutes referred to embraces both naked powers and powers coupled with an interest, the latter of course unnecessarily.

The language of the statute, 21 Hen. 8, is where testators have by their last wills "*willed and declared such their lands to be sold by their executors.*" The language of the section of the revised statutes referred to is, "*or where such estate is ordered by any last will to be sold by the executors,*" &c.

Where land is ordered to be sold; that is, where it appears from the will that the testator had determined to have it sold; such a trust is created as would be enforced by a court of equity in case of the death or refusal of one or all of the executors; and the statute does nothing more than *anticipate* the appointment of a trustee by a court of equity. But the statute has no application to cases like the present, where there is a *discretion* given to the executors to determine whether the land shall be sold or not. There is in such cases no *enforcible trust*, and the exercise of the discretion by less than the whole would be a manifest violation of the intention of the testator. (*Clay and Craig v. Hart*, 7 Dana, 2; *Wooldridge v. Watkins*, 3 Bibb, 349; *Coleman v. McKinney*, 3 J. J. Marsh. 248; *Peters v. Beverley*, 10 Peters, 532; 1 R. S. 734, § 96; and as to execution of such a discretionary power at common law, see *Sugden on Powers*, 145, 148, 222; *Moore*, 61, pl. 172; *Cole v. Wade*, 16 Ves. 27, 45, 46, 47; *Walter v. Maunde*, 19 id. 424; 7 Dana, 2, and cases cited; 2 Story's Eq. Jur. 397, § 1061.)

The testator directs his debts to be paid out of his estate; which is the usual direction in all wills, and gives the executors no authority to meddle with the real estate. The method of paying debts "out of the estate," where no power is given by the will to sell *real estate*, is first to appropriate all the personal property to that purpose, and upon that proving to be insufficient, the executor applies to the surrogate for an order to sell the real estate; before this can be obtained, it is necessary that all the heirs and devisees should be cited, and the executor must show "that the whole of the personal property which could be applied to the payment of debts of the deceased has

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been duly applied for that purpose." (2 R. S. 102, § 14, sub. 3.) Under a power to sell real estate to pay debts, the executors act without any check, and may *resort to the land in the first instance*. They may squander away every dollar of the personal property and still sell the real estate, and in answer to any complaint of the devisees they may say "*we think most fit and proper*." (See *Roseboom v. Mosher*, 2 Denio, 62.)

The common law doctrine respecting powers given to individuals "*nominatim*," and powers given to them "*eo nomine*," cannot affect the present case, because, 1st, the power is given to the executors *nominatim* and not *eo nomine*. (*Sugden on Powers*, 141, 2, 4; 4 *Ken's Com.* 326; *Powell on Dev.* 292; *Clay & Craig v. Hart*, 7 Dana, 2; 2 *Story's Eq. Jur.* 398.) 2d. A power to individuals *eo nomine* as "my executors" could not be executed by a *single* individual, because a single individual did not answer the words of the donor, "executors" in the *plural*. In the language of Coke, it could only be executed while the *plural number remained*. 3d. The doctrine did not apply to cases of mere discretion. See *Clay & Craig v. Hart*, (7 Dana, 2,) in which case the power was given to the "executors" *eo nomine*. (See also 1 R. S. 735, § 112.)

The statute (2 R. S. 71, § 15) declaring that any executor not named in the will shall be deemed superseded, does not aid the execution of the power in question. For if the statute *did* suspend the power of Thomas A. Morris, still *Willcocks acquired no additional power thereby*. But the statute *did not* suspend the powers of Thomas A. Morris as *trustee*; his powers as *executor* were suspended, but not his powers as *trustee*. (*Sugden on Pow.* 138; *Judson v. Gibbons* 5 Wend. 227; 4 *Hill*, 508, 512; 21 Wend. 432.) The object of the provision of the statute is manifest. At common law an executor might take possession of the testator's personal property and perform nearly all the legitimate duties of an executor without taking out letters upon the will. (*Teller on Ex'rs*, 24.) This was a defect in the law, and it was to remedy this that the statute was enacted.

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RUGGLES, J. The question to be solved here is not whether the power of sale survives to the surviving executor. The will declares expressly that it shall so survive. But that case has not occurred. The executors were all living when the deed in question was executed under the power. Two of the three had, however, neglected to act under the will. Only one had taken upon himself the execution of the will. He executed the deed in question alone and without the concurrence of the others. This was not a valid execution of the power at common law, and whether it was good under the statute of this state, (2 R. S. 109, § 55,) is the question presented for decision.

The statute is as follows: "Sec. 55. Where any real estate or any interest therein is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them or any of them, or where such estate is ordered by any last will to be sold by the executors, and any executor shall neglect or refuse to take upon him the execution of such will, then all sales made by the executor or executors, who shall take upon them the execution of such will, shall be equally valid, as if the other executors had joined in such sale." This statute is not a copy of 21 H. 8, ch. 4, but was intended undoubtedly to embrace all the cases adjudged to fall within the scope of the English act, and perhaps others.

But the plaintiff, who contests the validity of the deed, insists that the statute applies only to those cases in which the land is *ordered* to be sold by a positive and mandatory direction of the testator; and not to the case of a mere power of sale, or where there is a discretion given to the executors to determine whether the land shall be sold or not. This distinction appears to be somewhat nice and refined; one that might not occur to all readers of the statute. It seems to have slept unnoticed during the progress and termination of several contested cases in this state and elsewhere, in which the distinction, if sound, would have been fatal to conveyances that were adjudged, in those cases, to be valid.

In *Roseboom v. Mosher*, (2 Denio, 61,) the testator gave to his executors discretionary power to sell his lands, if in then

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opinion, it should become necessary for the support and maintenance of his wife and children. One of the executors neglected to qualify, and the other who acted sold the land and executed the deed. It was regarded as a valid execution of the power under the statute. The case turned chiefly on the question whether proof of renunciation by one was necessary to enable the other to execute the power; and it was held that mere neglect to act was enough without a renunciation. The objection in that case would, if valid, have been fatal to the deed, but it was not raised by the counsel, nor suggested by the court.

Sharp v. Pratt, (15 *Wend.* 610,) was a case of the same kind. Nicholas Kiersted by his will appointed four executors, and *authorized* them to sell his real estate which he had devised to his children. Two of the executors acted under the will and conveyed the land without the concurrence of the others. The contested question in the case was, whether it was necessary to show, in support of the deed executed by the acting executors, that the others had renounced; and it was held not to be necessary. The objection now made was not raised; but the language of the court shows that the statute authorizing acting executors to execute the conveyance, was supposed to apply as well to a mere discretionary power, as to a mandatory order of sale. The court say, "the statute intended to depart from the rule of the common law, by declaring *that when power is given to several executors to sell the land, it may be executed by such as take charge of the administration, if the others refuse or neglect to take on themselves the execution of the will;*" and after some further remarks the court proceed to say, "The deed, therefore, was equally efficacious to transfer the title of the testator as if it had been executed by all the executors named in the will. In this respect *the statute makes no distinction between a devise to sell and a bare authority.*"

In *Bunner and Manning, ex'rs, v. Storm*, (1 *Sandf.* 357,) Thomas Storm empowered his five executors to sell his real estate. Two of them acted, two renounced, and one was an

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infant. The two who acted sold the land under the power, and executed the deed without the concurrence of the others. In relation to the nature of the power, the vice chancellor said. "I am satisfied that the testator intended to make the executors the judges of the necessity for a sale." The question was whether the deed thus made by the acting executors was a valid execution of the power, and the vice chancellor adjudged that it was.

Here then are three cases in the courts of this state, in which discretionary powers of sale have been held to be within the statute, and well executed by acting executors without the concurrence of the others. If these cases are not regarded as adjudications settling the construction of the statute in this state, they furnish at least very strong proof of the general understanding of the profession and of the courts, that the statute embraces the case of a mere discretionary power as well as that of a peremptory direction.

But we are referred to three cases in the court of appeals of Kentucky, in which it is declared that where a power of sale is conferred upon executors, leaving it to their discretion whether to sell or not, and part of the executors renounce, the acting executors cannot execute the power.

By a statute of Kentucky, passed in 1799, it is enacted "that the sale and conveyance of lands *devised to be sold*, shall be made by the executors or such of them as shall undertake the execution of the will," &c. In one of the cases above mentioned, (*Woodriddle v. Watkins*, 3 *Bibb*, 349,) it was held that this statute did not apply to a case in which the testator had "left it in the power of his executors to sell or exchange any part of his estate, real or personal, as they might judge necessary for the advantage of his estate." The opinion appears to have been founded on the reading of the act, and not upon any previous adjudication. No authority is cited. The case was decided in 1814.

In 1830, in the case of *Coleman v. McKinney*, (3 *J. J. Marshall*, 246,) it was held that the statute did apply to a case in which the testator had directed his executors to sell his lands

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for the payment of his debts, if his personal estate should be insufficient for that purpose, because the contingency on which the sale was to be made did not depend on the judgment of the executors. In *Clay v. Hart*, (7 *Dana*, 1,) decided in 1838, that court affirmed the law as laid down in *Wooldridge v. Watkins*, and added that the like doctrine had been long and incontrovertibly settled in England, in reference to the statute of 21 *H. 8*, *ch. 4*. English books were referred to in support of that construction. But with the greatest respect for that learned court, I am compelled to say, that I find nothing in the books referred to to uphold the doctrine. On the contrary, Mr. Sugden in his treatise on powers, at the place referred to, (p. 75,) says that formerly *where a power was given to executors to sell, and one of them refused the trust, it was clear that the others could not sell, but that the 21 H. 8, ch. 4, had altered the law in that respect.* The doctrine derives no support from the case cited from Moore's reports, p. 61. That was not the case of a power of sale executed by an acting executor without the concurrence of a co-executor who had renounced. Nor was it the case of a power in which the executors had a discretion to sell or not. But it was a case in which the land was devised to be sold by the testator's executors, or by the executors of his executors. One of the testator's executors died intestate, and the survivor appointed executors and died; and the question was whether the executors of the surviving executor could make the sale. It was adjudged that they could not, because the power was committed not to them alone, but to them jointly with the executors of the other executor. This case throws no light upon the construction of the statute 21 *H. 8*. It shows simply that a joint power cannot, at common law, be executed by a part of those to whom it was entrusted, and without the concurrence of the rest. It was not a case within the 21 *H. 8*, because both the original executors were dead. Nor are the cases of *Cole v. Wade*, (16 *Ves.* 27,) and *Walter v. Maunde*, (19 *id.* 424,) any more satisfactory on this point. There the trust was to divide the estate of Sir Charles Boothe, among his nearest and most deserving relations—the distribu

tion to be made entirely in the discretion of the trustees. The trust was to be executed by *Ruddle and Wade*, the executors, *and the heirs, executors and administrators of the survivor of them*. It was declared that the devisees of the surviving trustee (who were not his heirs,) could not execute the trust, they not being the persons designated therefor by Sir Charles Boothe, the original testator. The case has no relation whatever to the statute 21 H. 8.

After bestowing some pains upon the search, I have not been able to find any English adjudication or dictum that the operation of the statute 21 H. 8, *ch. 4*, is limited to the case of a peremptory order to sell. Lord Coke speaks of it as embracing the case of "*a power to sell*." In his commentary upon Littleton, 113, a, he says, "In Littleton's case admit that one executor had refused to sell, then as the law stood when Littleton wrote, it was clear that the others could not sell. But now by the statute 21 H. 8, it is provided that when lands are willed to be sold by executors, though part of them refuse, yet the residue may sell: And albeit the letter of the law extendeth only *where executors have a power to sell*, yet being a beneficial law it is by construction extended where lands are devised to executors to be sold." Mr. Preston in his essay on abstracts of title (*vol. 2, p. 253*,) repeats the language of Lord Coke, saying, "This statute has been construed to extend as well to lands which are actually devised to be sold to two or more executors, as to lands *over which there is merely an authority*;" and in no English book can I find the trace of such a distinction as that upon which the decision was founded in the case of *Clay v. Hart*.

In *Jackson v. Given*, (16 John. 170,) Mr. Justice Platt seemed to have in his mind the distinction contended for on the part of the plaintiff. But that case presented a case of survivorship, and not a question under the statute. It was so treated by the counsel. The testator made four executors, and directed them *or any two of them*, to sell his estate upon his wife's death or re-marriage. Two of them died without qualifying. Two qualified as executors and afterwards one of them died, and

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the survivor sold and conveyed the estate. The two who qualified were authorized to sell by the express terms of the power. If the power survived, there was no need of the aid of the statute. If it did not, the statute could not aid the sale, because it was not made "by the executors who took upon them the execution of the will," one of them being dead. Under such circumstances the observation made by the learned justice at the commencement of his opinion, ought not to be regarded as authority, especially when taken in connexion with the subsequent cases heretofore mentioned.

The distinction upon which the court acted in the cases of *Wooldridge v. Watkins*, and *Clay v. Hart*, in the state of Kentucky, does not seem to have been recognized in any other state.

The Pennsylvania case of *Zebach's lessee v. Smith*, (3 *Binn.*, 69,) is against the Kentucky decisions. Bartholomew Zebach made his will, appointing three executors, and empowered them as follows: "to sell my land in Shamokin, on Penn's creek, in the old purchase, and to give good right. When my debts are paid, if any thing should remain, my wife shall buy two cows," &c. Two of the executors renounced and the other conveyed the land. There was no imperative direction to sell. The counsel for the plaintiff supposed that case to differ from the one in hand in this particular, that in the case of Zebach's will there was a trust which the creditors could have enforced in equity; but that in the will in question there was not such a trust. But it seems to me there was such a trust in both cases, and more plainly so in the case of Morris' will than that of Zebach, because in Morris' will the power is given expressly for the payment of debts, and in Zebach's it is only so by inference. The creditors have an interest in the execution of the power; and in case of a deficiency of personal estate, it ceases to be a matter of discretion in the executors whether to sell or not; it becomes their duty to sell. It is true the creditors may have another remedy, and perhaps a better one than a bill in equity against the executor to enforce the execution of the power, to wit, by application under the statute for an order to

sell. But that does not change the character of the power, nor exonerate the executor from his duty to the creditors.

In *Chanet v. Villeponteaux*, (3 *M'Cord's South Car. Rep.*) the testator devised his lands to be sold *at the discretion of his executors*, of whom there were two. One went to France without having qualified, and the acting executor made the sale and conveyance. It was adjudged to be a case within the 21 *H. 8*, which had been re-enacted in that state.

In *Wood v. Sparks*, (1 *Dev. & Bat. N. Car. Rep.*) the testator, by his will, made three executors, only one of whom qualified. That one, without the others, sold and conveyed the land under a power expressed in these words, "*If my executors should think it best*, I wish them to sell my real estate in the town of Plymouth, to the best advantage for the benefit of my children." The conveyance was adjudged to be a valid execution of the power by virtue of the statute 21 *H. 8*, *ch. 4*. It is true that no point appears to have been made in this case upon the discretionary character of the power. That question was not raised, although the case occurred more than twenty years after the decision of the case of *Wooldridge v. Watkins*.

But the question has been raised, argued and decided in the court of appeals of Virginia, and the decision was adverse to the rule adopted in Kentucky. It is worthy of observation that the statutes of Virginia and Kentucky, on this subject, are precisely alike, excepting that the statute of Virginia authorizes the administrator, with the will annexed, to execute the power of sale when all the executors refuse to act, in the same cases in which the acting executor can execute it when part of the executors refuse. The case alluded to was that of *Brown v. Armistead*, reported in 6 *Rand.* 593. The power of sale in the testator's will was in these words: "My will and desire is that my executors hereinafter appointed, sell, at public sale, all my land, provided the said land will sell for as much, in their judgment, as will be equal to its value; and the money arising from such sale to be placed in the hands of my friend *Stark Armistead*, one of my executors hereafter appointed, whom I vest with power to apply the said money to any use or uses he

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in his discretion may deem best for the benefit of my wife and all my children." The testator appointed three executors, all of whom refused to act. The sale was made and conveyance executed by the administrator with the will annexed. Judge Carr, in delivering the opinion of the court, says, "This statute," (speaking of that part of it of which the Kentucky statute is a copy,) "was taken from the 21 H. 8, ch. 4. It was admitted in the argument that if the testator had directed a positive and unconditional sale of the land by his executors, the case would have come directly within the law. But they are directed to sell provided the land will sell for as much, in their judgment, as will be equal to its value; and this, it is insisted, renders it a special confidence reposed in the individuals appointed executors, which is personal to them, and can only be exercised by them, and not even by a part of them, but by the whole only. This point was argued with great strength, but the researches of the counsel had enabled him to produce no cases in support of it, nor have I found any." The power was adjudged to be well executed. The opinion of the court was unanimous, excepting that one of the five judges was absent.

The argument on the part of the plaintiff is founded on the assumption that the statute, in speaking of lands "ordered to be sold," speaks only of those which the executors are peremptorily commanded to sell. But that would be a strict and narrow construction of a remedial and beneficial statute, the object of which was to prevent the failure of the power, and to carry out the intention of the testator as far as possible by the agents of his own selection. Although an authority to an executor to sell is not a command that he *shall* sell, it is substantially an order that he *may* sell.

The statute was designed as a remedy for the oversight of a testator in not providing for the contingency that some of his executors might refuse to serve; and it was framed upon the presumption and belief that if that contingency had been foreseen, the testator would have preferred that one of his executors should execute the power alone, rather than it should fail. This presumption applies with as much force to the case of a

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discretionary power as to one of a mandatory character. Very many testators are not aware of the common law rule, that in the execution of a joint power it is indispensable that all must unite. And in appointing the agents to execute a power involving the exercise of discretion, it is natural to suppose that each one would be selected with reference to his fitness and capacity for the trust. This inference is natural and fair in all cases where the testator has not thought proper to say expressly that a certain number must unite in the sale. Gaston, J. in *Wood v. Sparks*, (1 Dev. & Bat. 392,) says, "the great purpose of the statute, (21 H. 8, ch. 4,) is to correct mischiefs resulting from a rigid construction of these testamentary authorities, and it is the rule of law to so expound the act as to suppress these mischiefs and apply its remedies." In the present case the power of sale was expressly given to the surviving executor: and the testator thereby manifested his intention that in a certain event the power might be executed by one only of the three donees. It is true the event contemplated has not occurred; that is to say, Willcocks is not the surviving executor, and therefore at common law the power could not be executed by him alone; but if the testator in this case had not deemed each separate executor capable of executing the power alone, he would not have authorized its execution by the survivor; and in *Zebach's lessee v. Smith*, Yeates, J. says that by the statute 21 H. 8, an acting executor upon the renunciation of the others is put upon the footing of a surviving executor. The statute in fact goes further. It enables the acting executor to execute the power in those cases in which the survivor would not have that authority by the common law.

I am satisfied both on principle and on authority that the statute should be held to extend to all powers of sale conferred on executors, whether they involve the exercise of discretion, or are peremptory in their character. Wills may thus be carried into effect according to their true intention, when otherwise they would be defeated by circumstances unforeseen by the testator. The judgment of the supreme court and of the New-York common pleas should be reversed, and a *venire de novo* awarded.

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JEWETT, Ch. J. The devise did not pass any *interest* in the real estate of the testator to the executrix and executors named, but merely conferred on such of them as took letters testamentary thereon a power to sell and convey all or any part of his real estate, in case they in their opinion should find it proper or most fit to do so, to pay the debts of the testator.

This power is a mere naked power, not coupled with any interest whatever, and at common law could not have been executed by one of the three executors named. (4 *Kent's Com.* 5th ed. 320, n. c. ; *Sharpsteen v. Tillou*, 3 Cow. 651 ; *Bergen v. Bennett*, 1 *Caines' Cases in Err.* 15 ; *Jackson v. Schaubert*, 7 Cowen, 187.) And now by statute, (1 R. S. 735, § 112,) when a power is vested in several persons all must unite in its execution, unless previous to its execution one or more of such persons shall die ; in that case the power may be executed by the survivor or survivors. But this provision is limited and controlled by the provisions of the statute. (2 R. S. 109, § 55.) It is, however, contended that this statute does not affect the question, on the ground that the estate is not *ordered*, but merely *authorized* to be sold, upon the contingency that the three executors named, or the survivor of them, should in their opinion find it proper or more fit to sell it for the purpose of paying the testator's debts, and that the statute only operates upon and makes valid conveyances of land made by one of several executors in the case mentioned, where the testator *commands* or *imperatively* directs a sale to be made ; and does not extend to the case where a sale is merely *permitted* or *authorized* in the *discretion* of his executors.

The statute was passed to remedy the inconvenience, where some of the executors refuse or neglect to act, as executors ; by reason of which such power conferred could not, by the principles of the common law, be executed ; as all were required to concur in the act authorized to be done. The mischief is the same in effect, in the case where the testator has by his will *authorized* his executors in their *discretion* to sell his lands to pay his debts, &c. when some of his executors neglect or refuse to take upon themselves the execution of his will, as in the

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case where the same act is commanded or ordered to be done; and I think that the statute should receive a liberal construction, such as will suppress the mischief and advance the remedy, which is to render sales made under such power or authority by the executor or executors who do take upon them the execution of such will equally valid as if all of the executors named in the will had joined in the sale. It is by no means unusual, in construing a remedial statute, to extend the enacting words beyond their natural import and effect, in order to include cases within the same mischief. (*Dwarris on Stat.* 735.) My conclusion is that Willcocks had power under the will to convey the real estate of the testator, without the concurrence of his co-executor named in the will.

Judgment reversed.

MOORE, *appellant*, vs. DES ARTS, *respondent*.

The defendant imported into the city of New-York goods on which the collector of customs exacted and received duties. The goods were by law entitled to a drawback of the duties in case they were exported within three years. The defendant sold the goods to the plaintiff at the "long price," which by custom and agreement included the amount of duties paid, and carried to the purchaser the right to the drawback. Afterwards, and while the plaintiffs yet owned the goods and could export them so as to get the drawback, or could sell them in market at the "long price," the secretary of the treasury decided that goods of that kind were *duty free*, and thereupon the duties were refunded to the importer. In consequence of such decision the right to a drawback was extinguished, and the market price of the article was immediately reduced by about the amount of duties which had been exacted. *Held*, on bill filed to recover the amount of duties returned to the defendant, there being no fraud in the case, and no warranty that the goods were dutiable, and no allegation that the plaintiff intended to export the goods, that the plaintiff could not recover.

Quere, whether, in case the plaintiff had a right to recover the money, the remedy would not be at law.

APPEAL from chancery. Moore filed his bill before the vice chancellor of the first circuit against Des Arts, stating the case in substance as follows: In February, 1844, the defendant im

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ported into the city of New-York 56,540 pounds of spelter, (a species of zinc,) on which the collector at the port of New-York exacted, and was paid by the importer, the sum of \$565,40, for the duties, being twenty per cent ad valorem. The spelter was entitled to a drawback of the whole amount of duties in case it should be exported within three years. By usage and custom among merchants in New-York there are two modes of selling merchandise, so entitled to drawback; one at the "long price," the other at the "short price." By a sale at the "long price" is meant a sale at the full market value, including the amount paid for duties, so that the right to the drawback or return of duties is transferred to the purchaser, who receives back the duties in case he exports the article. By the "short price" of such goods, is meant a price less than the "long price" by about the amount of duties paid, and the purchaser at the "short price" is bound to export the goods so as to entitle them to the drawback which the importer receives; or in case the purchaser at the "short price" does not export them, then he is bound himself to pay to the importer the amount of the drawback.

After the spelter was imported, the complainant bought it of the defendant at the "long price," being $6\frac{1}{2}$ cents per pound, amounting in all to \$3675,10. The "short price" at the time of such purchase was $5\frac{1}{2}$ cents per pound; so that the difference, (one cent on each pound,) would be \$565,40, the amount of duties paid. After the purchase by the complainant, and in September, 1844, the secretary of the treasury decided that spelter was *free from duty*, under the name of "*teuteneque*," in the act of congress. And thereupon the sum of \$565,40, being the amount of duties which the defendant had paid on the importation of the spelter in question, was refunded to him. The spelter was yet owned by the complainant, and in a condition to be exported, so as to entitle it to the drawback; but, as the bill alleged, by the decision of the secretary of the treasury, the right to the drawback on exporting the goods, was *lost and extinguished*, and by the same cause the price of the article was immediately reduced by about the amount of duties paid, and the article could no longer be sold at the "long price."

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The bill further stated, that as soon as the decision of the secretary was made known, the complainant requested the defendant to furnish him with the proper authority to receive the return duties at the custom house, which the defendant refused to do; also, that after the defendant received such duties, the complainant demanded that the same be paid over to him, which payment the defendant also refused. The bill claimed to recover the said sum of \$565,40. There was no allegation that the complainant ever intended to export the spelter, or that he would have exported it, so as to obtain the drawback.

The defendant demurred to the bill for want of equity, and his demurrer was overruled by the vice chancellor, whose decision was reversed by the chancellor on appeal, and the bill was ordered to be dismissed. The complainant appeals to this court.

H. S. Dodge, for the appellant. The case presented by the bill entitles the plaintiff to the relief prayed, whether the spelter was charged with the duties correctly or illegally. Assuming the duties to have been improperly exacted, it is a case of mutual mistake. Both parties assumed and *expressly* agreed, that the article was dutiable, would be entitled to drawback, and on such assumption the contract for sale at the "long price" was made. This (if a mistake) was a mistake of fact, not of law. The question of fact being what was the meaning of "teuteneque" in the act of congress. The decision of the collector of the customs as to this fact could not be reviewed.

But if the duties exacted were payable as the parties supposed them to be, then the plaintiff was deprived, by the exercise of the discretion of the secretary of the treasury, of an advantage for which he expressly contracted and paid; the literal performance of so much of the defendant's contract as required him to receive the drawback as trustee for the plaintiff has been prevented, but the defendant has received an indemnity which he holds as trustee for the plaintiff in the same manner as he would have held the drawback if it had been received. Here is not only a failure of consideration by accident, but at the

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same time, a receipt of an indemnity, and precisely within the maxim "*neminem cum alterius detrimento fieri locupletiores.*" (1 *Story's Eq. Jur.* § 472, 473; *Quick v. Stuyvesant*, 2 *Paige*, 84; *Chase v. Barrett*, 4 *id.* 148; *Hachett v. Pattie*, 6 *Madd.* 4; *May v. Bennett*, 1 *Russ.* 370.)

The plaintiff is the purchaser and assignee of the defendant's right to any return of the duties, as well to an indemnity for the drawback, as to the drawback itself, and his equity is like that of the complainant in *Randal v. Cochran*, (1 *Ves. sen.* 98;) *Wood v. Young*, (5 *Wend.* 620;) *New-York Ins. Co. v. Roulet*, (24 *id.* 505;) *S. C. by the name of Varet v. New-York Ins. Co.* (7 *Paige*, 561;) *Heard v. Bradford*, (4 *Mass. R.* 326;) 8 *id.* 340; 3 *id.* 443; 2 *Denio*, 224; 4 *Hill*, 635.

The remedy is not exclusively at law; if there be any remedy at law it is the *equitable* action for money had and received. This action is a substitute for a bill of equity, and assumes a concurrent jurisdiction in equity, and courts of equity have not lost their jurisdiction because the law courts have extended theirs. (2 *Story's Eq. Jur.* § 1255, 1256.)

D. Lord, for the respondent. I. The merchandize, spelter, was not in law dutiable; and so was not within the usage alleged as to debenture goods.

II. Both parties are to be deemed conversant of the commercial name of the article, and then, whether dutiable or not, was a question of law; the parties contracting in knowledge of the law and fact, are silent as to the sum exacted as a duty; it is the vendor's money, and the vendee, without a contract for it, cannot claim it.

III. The contract of sale merely, (without any mistake of fact, or fraud, or contract for the amount exacted,) does not carry with it any obligation of refunding any part of the supposed components of the cost of the goods.

IV. If the contract of sale, by its nature or the usage alleged, contains an agreement to refund any part of the cost, then the remedy is at law; here being neither trust, mistake, acci-

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dent or fraud, and no ground of jurisdiction for discovery or account.

BROWSON, J. The case made by the bill amounts to this; and nothing more. The defendant imported the spelter, and paid the duties which were demanded by the government. The property was then sold to the complainant at the "long price," or full market value, which, according to the alleged usage in the city of New-York, and the intention of the parties, gave the complainant a right to the drawback, in case the goods should be exported at such time and in such manner as to entitle them to a drawback. While the goods still remained in a condition in which they might have been exported and the drawback secured, the secretary of the treasury decided, that the goods were free from duty; and thereupon the money which had been wrongfully demanded of the defendant when he imported the spelter, was refunded to him by the government. Immediately on publishing the decision of the secretary of the treasury, the right to obtain the drawback on exporting the goods was lost; and the complainant also lost the right and opportunity of obtaining an equivalent for the drawback by reselling the goods at the "long price"—the market value of the goods being reduced by about the amount of the duties. On this case, the complainant insists, that the money which was refunded to the defendant belongs to him.

Although there is a seeming equity in favor of the complainant, I have not been able to discover any principle upon which his claim can be supported. There was no warranty when the complainant purchased that the goods were dutiable; and no fraud of any kind is imputed to the defendant. So far as appears, the parties dealt upon equal terms, each knowing all that was known by the other. As the government officers have decided both ways on the question whether the spelter was subject to duties, it may fairly be presumed that these merchants knew that was a debateable question; they knew that the decision which had been made by the collector might be overruled by the secretary of the treasury, and the duties be refunded to

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the importer. With this knowledge the defendant sold, and the complainant purchased the spelter, with a right to the drawback, should that right ever become perfect. But there was no sale or purchase of the duties in case they should be refunded by the government, on the ground that the goods were not dutiable. At the time of the sale, there were two contingencies in which the duties might be restored to the importer: he might receive them as a drawback on exporting the goods; or the money might be refunded on the ground that it was improperly demanded at the first. The complainant purchased the right to the drawback; but he did not purchase the other right. And I do not see how we can give it to him without making a contract for the parties.

The argument for the complainant goes upon the ground, that he purchased the right to the duties should they be restored by the government for any cause. But that is not the case made by the bill. He only purchased a right to the duties in case they should be restored as a drawback on exporting the goods.

There is no allegation that the defendant did any act which deprived the complainant of the right to the drawback. On the contrary, the allegation is, that the right was lost to the complainant immediately on the making and publication of the decision of the secretary that the goods were free from duty. And such was evidently the necessary consequence of the decision. The right of drawback was at an end, whether the defendant received the money which the government offered to refund, or not. And the decision that such goods were free, would of course reduce their market value by about the amount which had before been charged for duties.

There is a further difficulty in the case. The bill contains no allegation that the complainant, at the time the secretary made his decision, intended to, or would have exported the goods, if the duties had not been refunded; nor that he could have sold the property to any one else for the purpose of exportation; nor that the goods then bore a higher price in any foreign market than they did in our own. Nor does it appear in

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any other way, that the complainant lost any thing of value, by losing the right, which he purchased, to the drawback on exporting the goods. The fall in the market value of the property did not result from the loss of the right of drawback; but was the natural consequence of the decision of the government that the goods were not subject to duties.

I am of opinion that the decree of the court of chancery is right, and should be affirmed.

Decree affirmed.

WINTER vs. KINNEY.

The policy of the law in declaring void bonds, agreements, &c. taken by sheriffs and other officers *colore officii* not in conformity with statute, is to guard against official oppression on the one side, and a lax performance of duty to the injury of the plaintiff in the process on the other.

An agreement made with a sheriff by which a party under arrest is permitted to go at large upon any terms other than those prescribed by statute is void. And so is any agreement taken from a party in custody intended as an indemnity to the sheriff for a breach of duty.

But the prohibition extends only to the officer, and not to the plaintiff in the process. Therefore, where a party under arrest was permitted to go at large, upon depositing with a third person the sum of money for which he was arrested, under an agreement, that if he did not surrender himself at a given time, the money might be paid over to the plaintiff in the process; *held*, in an action to recover back the money from the person with whom it was deposited, that the question was, whether the agreement was made with the officer, or with the plaintiff at whose suit the arrest was made; and upon the evidence, that question directed to be submitted to the jury.

ON error from the supreme court. Kinney brought assumpsit against Andrew Winter in the supreme court, and declared for money had and received to his use. The defendant pleaded the general issue, and the cause was tried at the New-York circuit, before EDMONDS, circuit judge, in May, 1845. It appeared on the trial, that the plaintiff, who was a contractor on the New-York and Erie rail-road near the line of New-Jersey, was arrested in the fall of 1840, by John A. Winter, a deputy

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of the sheriff of the county of Bergen in New-Jersey, at the suit of one Wanmaker. The arrest took place on a Saturday evening, between the hours of seven and ten o'clock, within the state of New-Jersey. The plaintiff, on being arrested, agreed with the defendant, that if he would become his bail until Monday morning, he would deposit with him \$340, that being the amount for which he was required to give bail; and in case he failed to surrender himself to the deputy on Monday morning, or settle with Wanmaker, then that the defendant should pay the money over to Wanmaker. Under this agreement the plaintiff deposited with the defendant \$340, being the money for which this suit was brought. Before daylight on Monday morning the plaintiff offered to surrender himself and demanded the money; but the defendant and the deputy refused to accept the surrender at that time, alleging that he was not to surrender himself until after daylight. The evidence was conflicting as to the hour on Monday morning when the surrender was to be made, and it did not appear that the plaintiff made any other offer to surrender himself. The defendant paid the money over to Wanmaker on being indemnified. One of the witnesses testified that *Wanmaker was present a part of the time when the agreement was made, and that the plaintiff and Wanmaker on the same occasion conversed respecting Wanmaker's claim.* Another witness testified that one of the persons present began to draw a bail bond; that the plaintiff remarked it was not worth while to be at the trouble and expense of drawing it, because he would see Wanmaker on Monday morning, and would arrange the matter with him, and there would be the end of it; *that it was all understood between them.*

The circuit judge ruled that the agreement under which the \$340 was deposited was void; that there were no questions of fact for the jury to pass upon, and that the plaintiff was entitled to recover. The defendant excepted. Verdict for the plaintiff. A motion for a new trial was denied by the supreme court, and judgment rendered for the plaintiff.

G. R. J. Bowdoin, for plaintiff in error.

Wm. Curtis Noyes, for defendant in error.

WRIGHT, J. An agreement made with a sheriff, or other public officer, to obtain an indulgence not authorized by law to a party under arrest, or in contemplation of the escape of such party; or the taking, by such officer, from a party in custody, an obligation or security not sanctioned by statute, for the ease and favor of the prisoner, and as an indemnity for a breach of duty on the part of such officer; has uniformly been held void under the statute of 23 Henry 6, chapter 9, in England, in this state, and in other states of the Union in which that statute has been in substance re-enacted; at least, when such agreements or securities have been prosecuted by the officer himself, or in the name of others for his benefit, or where the attempt has been made to set up or enforce them for his relief or protection. (1 *T. R.* 418; 7 *id.* 109; 7 *John. R.* 159; *id.* 436; 8 *id.* 76; 5 *Weind.* 61; 19 *id.* 188; 1 *Southard*, 319; 2 *id.* 811.) At common law, undoubtedly, independent of the statute, if the agreement made or security taken *colore officii* contemplate an indemnity for the fraudulent escape of the party arrested, or for any act inconsistent with the duty of the officer, whereby either official oppression, or injury to the plaintiff in the suit may result, such agreement or security is void. The statute of New-Jersey is substantially a re-enactment of that of 23 Henry 6. It provides that no sheriff, under sheriff, coroner, jailer, or other officer that may have a party in custody, "shall take or make, or cause to be taken or made, any obligation" for letting out of prison, or from arrest, by virtue of any writ, process or warrant, in any personal action, or by reason of any indictment for trespass, "or by color of his or their office, of any person, or by any person, by course of law, but only to themselves respectively, and by the name of their office, and upon condition written, that the said prisoner shall appear at the day and place mentioned and contained in the said writ, process or warrant." (*Elm. Dig.* 239; *Laws of N. J.* 1796.) The only mode in

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which the officer can discharge from arrest, is that prescribed by statute; nor can he take any obligation or security from the party in custody, conditioned otherwise than for his appearance at the day and place mentioned in the process. Should he do so, the act being without authority, he would not be protected against the party at whose suit the arrest was made, and the agreement or security being without consideration, so far as the officer was concerned, could not be enforced by him. The effect, therefore, is to render such agreement or security in the hands of the officer, or when attempted to be enforced for his protection or benefit, utterly void. The policy of the law in declaring void agreements and securities not taken in conformity to the statute, when attempted to be set up and enforced by the officer, is to guard against official oppression on the one side, and a lax performance of duty, to the injury of the plaintiff in the process, on the other. I would not be understood as saying that a public officer may not, under any circumstances, take a security unless it be one authorized by statute law. There are a variety of securities taken by the officers referred to in the New-Jersey statute, valid at common law, but not embraced within any statutory enactment. But where a party is in custody, and the officer, instead of taking the obligation for his release specifically prescribed by statute, takes one at his own volition, more or less onerous to the prisoner, he asserts, by virtue of his office, an illegal claim of right or authority to take it. He takes it *colore officii*. "Color of office," says Tomlin, "is when an act is evilly done by the countenance of an officer; and is always taken in the worst sense, being grounded upon corruption, to which the office is a mere shadow or color."

But the statute is confined to public officers; and hence a distinction is to be observed between agreements made by officers *colore officii*, and those with the party at whose suit the arrest is made. The latter may make such agreement or take such security as he pleases, on discharging his debtor from arrest. In *Hall v. Carter*, (2 Mod. 304,) it was said, though a sheriff cannot take a bond in any other form than that prescri-

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bed by statute, the party himself may; and this doctrine was affirmed in *Rogers v. Reeves*, (1 T. R. 422,) and *Fuller v. Prest*, (7 T. R. 109) The party may also agree or consent that the prisoner shall go at large on a deposit of money to discharge his debt, or dispensing with the bail bond, may accept his own, or the undertaking of another, that he will appear. But in these cases, the officer must not be a party in any way beneficially interested in the agreement or security.

There is but a single question in this case. If the agreement set up was made with the deputy sheriff, John A. Winter, through his brother Andrew, in contravention and evasion of the statute, it was void; and Kinney having parted with his money without consideration, it still belongs to him. On the other hand, if the contract was made with Wanmaker, the plaintiff in the writ, or with his assent and for his benefit, and the sheriff was no party to it, it was upon sufficient consideration, and legal.

The circuit judge decided that the defendant, Andrew Winter, had not sustained his defence, and that it ought not to be submitted to the jury; and he charged the jury "that there were no questions of fact for them to decide, and that the plaintiff was entitled to recover, because the agreement on which the money was deposited was without consideration and void;" thus withdrawing from their consideration the question whether the agreement had been made with Wanmaker, the creditor, or with the sheriff, and assuming to decide himself, from the evidence, that it was with the latter. In this I think he erred. Whether the agreement was void or not, depended upon the question of fact whether it had been made with the sheriff or with Wanmaker, the plaintiff in the writ. In this case, this was a question, with proper instructions as to the law, for the jury. There was some evidence, at least, favoring the idea that Wanmaker was a party to the agreement, or that it was made for his benefit, and by his authority and consent. He was present part of the time whilst Kinney was under arrest, and he conversed with Kinney respecting his claim. Kinney

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spoke of seeing him on Monday morning, according to the terms of the agreement, with the view of arranging his debt, and remarked "that it was all understood between them." Wanmaker sent a message to Kinney to meet him for settlement on Monday morning, showing that he understood the agreement, and assented to it at the time it was made, or subsequently; and Wanmaker afterwards received the money that had been deposited. These facts, in connection with the other evidence in the case, may have failed to satisfy the jury that Wanmaker, and not the sheriff, was a party to the agreement, but they were not so weak and irrelevant as to justify the court in authoritatively withholding them from their consideration. It is peculiarly the province of the jury to reconcile conflicting testimony, and settle disputed questions of fact.

On a new trial, should the jury find that the agreement was made with the sheriff, or that he was a party in any way beneficially interested in it, it will not be necessary to pursue the further inquiry, whether it had been substantially complied with by Kinney, as it would be unauthorized and void; but should they find that it was made with Wanmaker, the creditor, then the question of performance by Kinney would necessarily arise.

At the trial the defendant offered to show the amount and consideration of the debt of Wanmaker against Kinney—that the same was a just debt for three hundred and fifty dollars, and had been so admitted by Kinney, and agreed to be paid by him. To which evidence, so offered, the plaintiff objected, stating that if he was permitted to go into such evidence, he was ready to show that he did not owe Wanmaker, or if any thing, but a small sum, not exceeding ten dollars. The circuit judge refused to allow or permit the defendant to give any evidence concerning the debt due from Kinney to Wanmaker. In this I think he was right. It was clearly an attempt to throw into the case an irrelevant and impertinent issue.

Upon the ground, therefore, that there was a question of fact in the case that should have been submitted to the considera-

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tion of the jury, I am of the opinion that the judgment of the supreme court should be reversed, and a *venire de novo* awarded, costs to abide the event.

Judgment reversed.

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167	304
167	306

Where the charter of a mutual insurance company authorized such company, "for the better security of its dealers," to receive premium notes in advance, of persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay to the makers of such notes a compensation not exceeding five per cent. per annum, on so much of the notes as exceeded the premiums on policies actually taken; *held*, that a note taken by the company in pursuance of its charter for premiums in advance, was valid and effectual for the whole face thereof, although the premiums on insurances actually received by the maker, amounted to only a part of such note.

It seems, that a note so given, is valid by force of the statute authorizing it to be taken, and therefore that a partial failure of consideration cannot be set up to defeat a recovery of the full amount.

But if a consideration is necessary, the concurrence of others in giving similar notes for the purpose of giving a credit to the company in pursuance of an agreement entered into by all the makers, the contemplated advantages of insurance in such company, and the compensation authorized to be paid to the makers on such an amount as the notes should exceed the premiums on insurances actually taken, constitute a sufficient consideration to uphold such a note.

THE Merchants' Mutual Insurance Company brought as sumpsit in the superior court of the city of New-York, against Deraismes & Boizard, upon a promissory note made by them, as follows:

"\$2785.05.

New-York, December 4, 1844.

Twelve months after date we promise to pay the Merchants' Mutual Insurance Company, or order, for value received, twenty-seven hundred and eighty-five dollars and five cents.

DERAISMES & BOIZARD."

This note was given in renewal of a previous note for \$3000,

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which was given for *premiums in advance on policies of insurance*, intended to be received by the defendants from the plaintiffs, under the twelfth section of the act incorporating the plaintiffs, (*Stat.* 1843, *p.* 73,) and in pursuance of the following agreement, which was signed by the defendants and others: "The subscribers hereby agree to give their notes at one year from date, to The Merchants' Mutual Insurance Company, of which William Neilson is intended to be the President, for the amounts set opposite to their names respectively, being for premiums on risks to be taken by said company on the following conditions: First. The amount of said risks shall be respectively at least the sums affixed to our signatures, the rates of premiums to be agreed upon hereafter. Secondly. That this agreement shall be entered into by persons satisfactory to each of us, and to the collective amount of two hundred thousand dollars. Thirdly. That the rates charged by The Merchants' Mutual Insurance Company shall be the same as are charged by the insurance companies of this city. Fourthly. That the subscribers shall enjoy the advantage of The Merchants' Mutual Insurance Company, as secured by charter, and shall in no event be made liable for the debts of the company, beyond the amount of their several subscriptions." The defendants actually took policies of insurance in the company, in pursuance of the above agreement, and of the twelfth section of the charter, to such an amount only as that the premiums thereon amounted to the sum of \$790, and no more. This sum, before the trial of the cause, had been paid to and accepted by the plaintiffs' attorney, together with the costs up to the time of such payment; and it was insisted that the note was not valid or collectable for any further sum, being, as was contended, for all beyond that sum, an engagement to pay premiums on risks which the company never assumed. The company became insolvent in consequence of losses sustained by the great fire in 1845.

The judge who tried the cause in the superior court, charged the jury, that as matter of law upon the whole case, the plaintiffs were entitled to recover the full amount of the note, less

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the sum of \$790 paid. A verdict and judgment were had accordingly, and the defendants having duly excepted, bring error into this court.

C. O'Connor, for the plaintiffs in error. The note in question was given in advance for premiums on risks to be assumed by the company for the defendants; and so far as risks were not assumed the plaintiffs were not entitled to recover. The notes, authorized to be taken for premiums in advance from persons intending to receive policies under the 12th section of the act of incorporation, are not absolutely and unconditionally payable, whether the company earn premiums or not. That section is merely an enabling clause and not a clause providing a *capital* for the company. Its object was to provide the company with accommodation notes, which if needed, might be used to pay ordinary expenses and losses occurring in the regular course of its business. The other provisions of the charter harmonized with this construction, (§§ 11, 13, 15 16 17, 24,) while the construction contended for on the other side would lead to the greatest absurdities and incongruities. The nature and history of mutual insurance companies, and a comparative view of the characters they have borne at different times, also support the construction which we contend for. (*Strang v. Harvey*, 3 Bing. 304; *id.* 315; 2 Term Rep. 512; 7 *id.* 339; *Laws of 1809*, p. 154; *id.* 1802, p. 152; *id.* 1814, p. 56; *id.* 1816, p. 111; *id.* 1834, p. 530, §§ 4, 7, 8; *id.* 1836, p. 128, §§ 6, 8, 11.)

D. Lord, for the defendants in error. The defendants gave the note in question for the purpose of aiding in the establishment and support of a company for mutual insurance, without any stock capital. The advantages from such company to every person intending to take out policies, were a consideration sufficient to uphold a note given for the above purpose. The uniting or concurring with others who were to give similar notes, and the giving of such notes by others, was a consideration sufficient to uphold the note. It was also a sufficient con-

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sideration to sustain this note, that the company organized and commenced business upon the basis of this and other similar notes, and issued policies to the makers. The taking of policies by dealers with the company, having the 12th section of this charter in its constitution, was a credit given to the company upon all the assets in its possession, and was also a good consideration. The note was valid as a statutory security; the statute itself removed the objection of the want of consideration, and it sanctioned a compensation for the liability.

The notes are valid as a security to dealers for their full amount; otherwise they would not be a security to dealers. As mere advances of premiums, not to be valid unless the policies were taken out, the notes were in nowise a security for dealers. As notes to be valid only when negotiated before insolvency, they would afford no security to dealers, but would create as large a claim on the company as that which their negotiation satisfied. They were intended to induce insurances with the company not only from strangers, but from the givers of the notes; to induce the makers to fill them up by premiums. If the makers are not held liable for the full amount, this object would be defeated.

GRAY, J. This is an action to recover from the plaintiff in error a note for \$2785.05, executed to the Merchants' Mutual Insurance Company, in renewal of a note for \$8000, given by them to said company, pursuant to the provisions of the twelfth section of the act of incorporation of said company, passed April 10, 1843. (*See Sess. Laws of 1843, ch. 95, p. 73.*) The second section of the act provides that after having received approved applications for insurance to the amount of \$500,000, the premiums on which shall have been actually paid in or secured to be paid, the company may be organized and commence its operations. No objection having been made on that ground, we are authorized to infer that all the requirements of the act, preliminary to the due organization of the company, were observed and fully complied with. The 12th section of the act provides that "the company, for the

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better security of its dealers, may receive notes for premiums in advance, of persons intending to receive its policies, and may negotiate such notes for the purpose of paying claims or otherwise in the course of its business," and authorizes a compensation not exceeding five per cent. per annum to be made to the signers of such notes on such portion thereof as may exceed the amount of premiums actually paid in by the several makers respectively.

The note in question was given for premiums in advance under the 12th section. The premiums on insurances actually taken amount to \$790, and to that extent the validity of the note is not denied. But the concession that the note is so far valid, it seems to me, virtually admits that it is good for the whole amount. It is not like an ordinary commercial note, where a partial failure of consideration may be set up as between the original parties. I look upon this note as a statutory security, the validity of which may be rested entirely upon the statute authorizing it to be taken, and does not at all depend upon any question of consideration. And in this view the security, if good for any amount, is valid and effectual for the whole. If, however, a consideration should be deemed essential to its validity, then the agreement signed by the plaintiff with others, interested as associates in this company, to give their notes respectively, and to share severally the liabilities and enjoy the advantages of The Merchants' Mutual Insurance Company, as secured by its charter, and the fact also that dividends of the profits on the excess of the notes so given, over and above the amount of premiums on actual insurance, were also provided for by the charter, and to be annually distributed to the several makers of notes, constitute a consideration valid and sufficient to uphold this note.

It was alleged on the part of the plaintiffs below, on the argument, and the fact was not at all controverted, that the note in question to its full amount with, the notes of other persons given in advance for premiums, was, by the commissioners, included with the premium notes on actual applications, and used to make the amount of \$500,000 required by the 2d section of the

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act as a prerequisite to the organization and commencement of operations of the company.

It may be questionable, perhaps, whether under the provisions of the charter these notes were thus applicable, and whether they could be made legally available as the basis on which alone the organization of the company was authorized by the legislature. But this question was not raised. The objection of the plaintiff in error does not extend to the legality of the company's organization, nor to the collectability of that part of the note amounting to the premium on insurance actually made; but the objection and the only question submitted for our consideration is, whether this note, as to the balance beyond the actual insurance, can be collected. Of that I have no doubt. Admitting what I deem is conceded by the plaintiff in error, that the company was duly organized, and that the note was taken in the exercise of its legitimate powers, and is valid in part and collectible to the amount of \$790, and there remains not a doubt of the validity and collectability of this note to its entire amount, and the application thereof by the company to the purposes authorized by its charter.

It was not the intention of the legislature, nor is it necessary to the validity of these notes to their full amount, that insurance by the company shall, at the time, or subsequently, be actually made to the persons making the notes, to such an amount as that the premium thereon shall in amount be equal to the amount of the notes. That is not at all important or necessary. The object of this note and all similar notes taken by the company, and the purposes for which they were designed by the legislature, are for the better security of the dealers with the company; and if losses have been or shall at any time be sustained by those dealers, these notes to the entire amount thereof are legally as well as equitably applicable to the payment and liquidation of those losses. By the great fire in New-York in 1845, this company incurred liabilities on account of insurances to an extent exceeding altogether its means, and was rendered utterly insolvent; and justice requires, therefore, that all its available means shall be collected and faithfully appropriated to meet the losses of its dealers and creditors. It would be a

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palpable perversion of the object and design of the legislature, and a gross fraud upon the dealers and creditors of the company, to hold that these notes and securities, upon the basis of which the community has been induced to deal with the company, are void and uncollectable wholly, or available only to the extent of the actual insurance made thereon.

I am of opinion that the judgment of the superior court should be affirmed.

Judgment affirmed.

BOGERT vs. MORSE.

It seems, that where one party receives money from another, and there is no explanation of the fact, the presumption is that he receives it because it is his due, and not by way of loan.

But where a witness testified, that he asked the defendant if he had had any money of the plaintiff, and the defendant replied that he had had twenty dollars of him, and the witness then told the defendant that the plaintiff had requested the witness to speak to him about it, to which the defendant made no reply, but turned away; HELD, that a jury might infer from this evidence that the money was received by way of a loan, and the jury having so found, that their verdict in a justice's court was conclusive.

ON error from the supreme court. Morse sued Bogert in a justice's court for money lent. The cause was tried by a jury, and on the trial a witness called for the plaintiff testified that at the request of the plaintiff he went to see the defendant about some money lent; that he asked the defendant if he had had some money of the plaintiff; the defendant replied that he had had twenty dollars of him; the witness then said to him that the plaintiff had requested the witness to speak to him about it; that the defendant made no reply to this observation, but turned away. There was no other evidence in the case, and the defendant requested the justice to nonsuit the plaintiff. The justice refused to do so, and submitted the evidence to the jury, who found a verdict in favor of the plaintiff for the \$20, on which the justice entered judgment. The defendant removed the

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judgment by *certiorari* into the common pleas of Yates county where the judgment was reversed. The plaintiff then brought error into the supreme court, where the judgment of the common pleas was reversed and that of the justice affirmed. The following is the opinion of the supreme court.

By the Court, BRONSON, Ch. J. What the plaintiff said to the witness was not communicated to the defendant, and must therefore be laid out of view. The proof then stands thus: The witness went to the defendant's store and asked him if he had had any money of the plaintiff. The defendant said he had had twenty dollars of him. Upon this proof, without any thing more, the fair and reasonable inference is that the defendant received the money because it was due to him, and not by way of a loan. When one man delivers a sum of money to another, if there be nothing else to explain the transaction, the legal presumption always is that the money belonged to the one who received it, and not that he thereby became a debtor to the other. (*Welch v. Seaborn*, 1 *Stark. R.* 474.) But the plaintiff thinks his case is helped by what followed. After the defendant said he had had twenty dollars, the witness said to him—the plaintiff told me to speak to you about it. The defendant made no reply, but turned around and went into the store. I feel some difficulty in saying that this made out a *prima facie* case for the plaintiff. If the money was received because it was due to the defendant, he would understand from what the witness said that the plaintiff wished to obtain evidence of the payment; and as that admission had already been made, there was no occasion for a reply. Nothing was said about a loan; and the facts proved are about as consistent with the supposition that the defendant received the money as a creditor, as that he received it as a debtor. The plaintiff holds the affirmative; and must show that it was a loan. It is not enough for him to make out a balanced case, and then leave it to a jury to guess at the truth.

Although my brethren agree in this rule, they think that the scales were turned in favor of the plaintiff; that the act of the

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defendant in turning away without a reply, when he was told that the witness had been directed to speak to him about the money, furnished some evidence that he received the money as a loan, and so made out a proper case for the consideration of the jury. On reflection, I shall not dissent from that view of the case. If there was enough to carry the cause to the jury, their decision was final. The judgment of the common pleas must therefore be reversed, and that of the justice affirmed.

The cause was argued in this court by *E. Van Buren*, for plaintiff in error; and *B. W. Franklin*, for defendant in error.

After advisement the court were of opinion that the evidence was proper for the consideration of the jury, and the jury having found that the money was received by the defendant as a loan, that the common pleas erred in reversing the judgment of the justice. The judgment of the supreme court was therefore affirmed.

1	379
137	524

AN LOHMAN, *alias* Madame RESTELL, vs. THE PEOPLE.

Mere surplage in an indictment will not vitiate, and therefore where an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts, which go to constitute a felony provided all the facts alleged fall short of the charge of felony, in consequence of some other fact essential to that charge, *e. g.* the intent of the party accused not being averred.

By statute (*Laws of 1845, ch. 260, § 2*) it is a misdemeanor to administer drugs &c. to a pregnant female *with intent to produce a miscarriage*; and by statute (*Laws of 1846, ch. 22, § 1*) it is manslaughter to use the same means *with intent to destroy the child*, in case the death of such child be thereby produced. The indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in its conclusion it characterized the crime as manslaughter; but the only intent charged was an *intent to produce a miscarriage*; HELD that the indictment was fatally defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence.

A conviction for a misdemeanor under such an indictment would, it seems, be a bar to a subsequent indictment for the felony. The record would be conclusive evi-

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dence that the acts were done with the intent alleged in the indictment, and therefore the people could not allege a different intent, so as to constitute a different offence. A juror being challenged to the favor testified before the triers, that he had formed no opinion and had no impressions as to the guilt of the prisoner, but that it had been and was still his impression that the general character of the prisoner was bad. The question was then put to the juror whether he would disregard what he had heard and read, and render his verdict according to evidence. Objected to, and exception taken. *Held* that the question, although inartificially put, substantially called for the consciousness of the juror as to his ability to try the cause impartially, and therefore that it was properly allowed.

A witness is privileged from answering a question when the answer would tend to disgrace him, unless the evidence would bear directly upon the issue; and therefore, where the answer could have no effect upon the case, except as it might impair the credibility of the witness, *held* that he was privileged.

Where the cross-examination of the principal witness for the people was conducted in a manner tending to impair her credibility, and to show that the prosecution was the result of a conspiracy in which she was concerned; *held* that it was competent to sustain the witness, by showing that another person, to whom the facts had become professionally known, wrote to the public authorities, and was the cause of the prosecution being instituted.

THE defendant was convicted in the court of general sessions of the city and county of New-York, under the second section of the act to prevent the procurement of abortion, passed in 1845, and sentenced to imprisonment in the county jail. The judgment of the court of sessions was affirmed on a writ of error, by the supreme court, (*see 2 Barb. Sup. Court Rep. 216*,) which last decision the defendant removed by writ of error into this court.

The first section of chapter 22, (*Sess. Laws of 1846, p. 19*,) enacts in substance, that every person who shall administer to any woman pregnant with a quick child, any medicine, drug, &c. or shall use any other means *with intent thereby to destroy such child*, (unless the same are necessary to preserve the life of the mother,) shall, in case the death of the mother or child be thereby produced, be deemed guilty of manslaughter in the second degree. The second section repeals the first section of the act to punish the procurement of abortion, passed in 1845; and the first section above quoted is a transcript of the section repealed, with the addition of the words, "in case the death of such child or mother be thereby produced."

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The second section of the act of 1845 provides, that if the means mentioned in the first section are used "*with intent to procure the miscarriage of such woman,*" the offender shall be punished by imprisonment in the county jail, &c.

All the counts in the indictment averred an intent upon the part of the defendant "to procure the miscarriage of Maria Bodine," varying only as to the means used, and alleging that "by means thereof the death of the child was procured." The several counts then conclude as follows: "And so the jurors aforesaid do say, that the defendant the said quick child in the manner and by the means aforesaid, feloniously and wilfully did kill and slay, against the form of the statute."

At the trial, one Cortelyou was called as a juror, and challenged to the favor by the defendant, which was denied by the people; and upon the issue thus joined the juror was sworn as a witness for the defendant, and testified that he had formed no opinion as to the guilt of the prisoner; that what he had read made no impression upon his mind; that he did not think he had ever read a full statement of the case; that he did not think he had any impressions as to the guilt or innocence of the prisoner; but it had been and was his impression that the general character of the defendant was bad. On his cross-examination he was asked by the counsel for the people the following question: "If you were sworn as a juror in this cause would you disregard what you have heard or read out of court, and render your verdict upon the evidence?" The question was objected to as irrelevant, as calling for the *opinion* of the witness, and as substituting his judgment for that of the triers. The court overruled the objection, and the defendant accepted.

Upon the trial Maria Bodine, the person named in the indictment, was called as a witness by the people, and testified that she went to live with one Cook in the month of July, 1845, that she had intercourse with him about a month after, which was continued to May, 1846, at which time she discovered that she was pregnant. Upon the cross-examination, the counsel for the defendant proposed the following questions to the witness

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which she declined to answer upon the ground that they would tend to *disgrace her*. "Had you any sexual intercourse with any other person than Cook prior to April, 1846? Had you during the fall of 1845, or winter of 1846, the venereal disease? Had you any sexual intercourse with any other person than Cook between July, 1845, and April, 1846?" The court refused to compel the witness to answer, and to this decision the defendant excepted.

After a protracted cross-examination of Maria Bodine, one object of which was to *impair the credit* of the witness, the counsel for the people called Dr. Smith as a witness, who testified to an examination of Maria Bodine, made by him in May, 1847, and as the result of that examination, his opinion as a physician, 1st, that the female must have been delivered of a child badly managed, or 2d, that an abortion must have been procured upon her, or 3d, that there had been some mechanical injury, or injury by some instrument, or violence. He was then asked by the prosecution the following question: "In consequence of your examination, and the opinion you formed, and in consequence of a communication confidentially made to you as a physician by Maria Bodine as your patient contemporaneously with your examination, what steps did you take?" On inquiry by defendant's counsel, the counsel for the people avowed the object of the question to be in substance to sustain the testimony of Maria Bodine, by showing by the witness that he wrote to the mayor of New-York, and was the cause of the prosecution being instituted. To the question, and the offer of the counsel for the people, the defendant objected; the objection was overruled and an exception was taken.

E. Sandford, for plaintiff in error.

J. McKeon, (district attorney,) for the people.

By the Court, GARDINER, J. The indictment is defective under the first section of the act of 1846, in omitting to charge an intent to destroy the child by the means employed by the

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defendant. It contains all and more than is necessary to constitute a misdemeanor within the 2d section of the act of 1845.

Mere surplussage will not vitiate the indictment, and of course is no ground for reversing the judgment. (*People v. Jackson, 3 Hill, 94, and cases cited.*)

It is contended, however, that the prisoner, notwithstanding this conviction, may be indicted for manslaughter, adding to the charges in this indictment the intent to destroy the child. If this were admitted it would furnish no ground for reversal. The offences created by the first section of the act of 1846, and the second section of the act of 1845, are separate and distinct, as the counsel for the defendant strenuously insists. The prisoner has been found guilty of a misdemeanor; and I do not perceive how this court, in face of the verdict and the record, can assume that the defendant has been guilty of a felony.

Upon the same principle, if the defendant had been convicted of an assault and battery, we might have been asked to reverse the judgment, because she might have been guilty of a battery with intent to kill. To constitute a felony, nothing would be necessary but to add the intent to the other allegations of the indictment.

But in the second place, I incline to the opinion that the defendant could plead this conviction in bar to a subsequent indictment for the felony, under the first section of the act of 1846. The right does not result from the doctrine that a party cannot be put a second time in jeopardy for the same offence, because as we have seen the offences under the 1st and 2d sections, are distinct, but from a principle of wider application, namely, that the accused may always avail himself of the plea of a former conviction, if the record shows affirmatively that the defendant could not have been guilty of the crime charged in the indictment.

The difference in the offences as laid in *this indictment*, and the felony under the 1st section of the act of 1845, it is said truly, consists solely in the *intention* of the criminal—the means of their commission and the consequences in either case being precisely the same. Now to constitute a misdemeanor

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under the statute, the indictment must *allege*, and upon conviction the jury must *find*, that the means charged were used with *the intent to procure a miscarriage*. The people therefore would be concluded by the record from alleging, in a subsequent indictment, that the prisoner employed the same means, upon the same person and occasion, with a different design.

A conviction for manslaughter is a bar to a subsequent indictment for murder. The distinction in the offences consists in the intent with which the homicide is committed. The record of conviction would show, in effect, that the killing was without malice, and would be conclusive upon the people and the accused. (*Chit. Cr. L.* 456 ; *Coke's R. part 4*, 146.) The case of *Rex v. Cross*, (1 *Ld. Raym.* 711,) cited by the defendant, is an authority to show that where the *same* facts which constitute a misdemeanor at common law, are made felony by statute, the indictment must be for felony. The case in 5 *Mass. R.* 106, and 9 *Cowen*, 578, decide that where a conspiracy is consummated, you cannot separate the agreement to conspire from the overt act by which it is accomplished. These are all instances of merger, and have no application to a case like the present, where the offences created by the 1st and 2d sections of our statutes are conceded to be separate and distinct.

As to the question put to the juror Cortelyou. The issue to be tried was whether the juror stood indifferent between the parties. This of course depended upon his state of mind. To ascertain this was the object of the examination of both parties. Upon an issue of this kind, from the nature of the fact to be established, the opinion of the juror derived from his own consciousness, was relevant, competent and primary evidence. The interrogatory put was in form exceedingly inartificial, but its effect (and to this only the objection applies) was obviously to elicit an opinion as to the strength of the impression to which he had previously testified, and whether he was conscious of the ability to render a verdict according to the evidence notwithstanding. If the juror answered in the affirmative, it would have been a declaration that he possessed such ability. This would be but an opinion, but one founded on his own

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consciousness, and so far entitled to the consideration of the triers, although by no means conclusive upon them. If he had responded in the negative, the answer would (if believed) have been decisive against his competency. For although a man may think himself impartial when he is not, he cannot be a competent juror if conscious of an inability to render a verdict without being influenced by previous impressions. The question then was equivalent to asking the juror whether he felt or was conscious that he could render an impartial verdict notwithstanding all that he had heard or read. This in effect was the question put and sustained by the supreme court, in *The People v. Bodine*, (3 Denio, 122.)

As to the questions proposed to Maria Bodine. It is hardly necessary to say that the answers sought to these questions would have disgraced the witness. She was therefore privileged from answering unless her answers were material to the issue. Her pregnancy was, it is true, one of the facts to be established by the prosecution, but whether induced by Cook or any other person was entirely immaterial. If her response had been in the affirmative to each of these interrogatories, it would not have been inconsistent with, or tended to disprove the fact of her pregnancy, or the agency of the prisoner in procuring the miscarriage, any farther than those answers affected her general character. The privilege of witnesses has been carried much farther in some of the cases, but all the authorities agree, that where as in this case, the object of the question is to impair the credibility of the witness, she could not be compelled to answer. (*People v. Mather*, 4 Wend. 250, and cases cited; *Cowen & Hill's Notes*, No. 521, and cases cited; 1 *Burr's Trial*, 244; 1 *Greenl.* § 454.)

As to the exception to the question proposed to Dr. Smith. It is now said that the question assumes two facts, viz. 1st. that Maria Bodine had made a confidential communication to the witness, and that he took some steps in consequence thereof; and 2d. that the communication, if made as assumed, was privileged. If this were true, the answer is, that these matters were not suggested upon the trial, nor was the attention of the

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court directed to them. The objection was of the most general character. The opinion formed by the witness upon the examination testified to by him, aided by communications from the patient as to her symptoms and the state of her health, was not only competent evidence, but strongly corroborative of her testimony. (1 *Greenl.* § 102.) It was a part of the *res gestæ*. If the physician was thereby induced (even if it was not the sole motive) to resort to the public authorities for the purpose of further investigation, I can perceive no objection to the fact being proved. The cross-examination of Maria Bodine, as is manifest from inspection, was designed to discredit her with the jury. She had stated in answer to the defendant's inquiries, the fact of her making a written statement at Walden, which she delivered to officer Boyer at that place, and minutely the circumstances of her visit to New-York after the crime was committed, and of her attendance before the grand jury. Now the defendant is not at liberty to say that this examination was irrelevant—and it could only be material with a view to impeach the veracity, or the motives of the witness, by showing her agency in procuring the indictment. In either view, the testimony of Smith was important, as it went to corroborate her statement and vindicate her motives.

We think there was no error in the judgment of the supreme court.

Judgment affirmed.

BARRON vs. THE PEOPLE.

The deposition of a witness taken in a criminal case pursuant to the statute relating to certain offences committed in the city of New-York, (*Stat. of 1844, p. 476, § 11.*) may be read in evidence on the trial of the indictment, on proof that the witness is a non-resident of the city at the time of the trial, and was so when the deposition was taken.

Where, however, the only proof preliminary to reading the deposition was the evidence of a person employed by the district attorney to serve subpoenas, who testi-

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find that a subpoena was issued to him for the witness whose deposition was offered to be read, that he called at two of the hotels in the city, where, as he was informed by the district attorney, the witness stopped when he was in the city, that he inquired of the bar-keepers at each of those places, and was informed that the witness was not at either of those places, and did not live in New-York to their knowledge, that he could not find the witness in the city, and did not know where he resided; held insufficient to authorize the deposition to be read.

ERROR to the supreme court. Barron was indicted in the New-York general sessions for grand larceny, committed in that city. The indictment was removed into the New-York oyer and terminer, and tried there. On the trial the district attorney offered to read in evidence against the defendant the deposition of James Whaley Bennett, purporting to have been taken *de bene esse* on the 27th of April, 1847, before the recorder of the city, pursuant to *Stat.* 1844, *p.* 476, § 11. The deposition was filed on the 30th of April—three days after it was taken. To authorize the reading the district attorney called Thomas W. Brennan, who testified as follows: "I am one of the officers employed in the office of the district attorney of the city of New-York to serve subpoenas, and had a subpoena in this cause for James Whaley Bennett. I had a subpoena for Bennett to look for him, to look after him, to serve it on Bennett. I went to Rathbun's hotel and Lovejoy's hotel in this city, the places where I was informed by district attorney that Bennett stopped when he was in the city. I went to Lovejoy's and Rathbun's several times, at each time the cause was on the calendar since — last. I inquired of the bar-keepers at each of those places for Bennett, and was informed that he was not at either of those places, and did not live in New-York to their knowledge. I could not find Mr. Bennett in this city." On cross-examination the witness said, he did not know where Bennett resided.

The defendant's counsel objected to the reading of the deposition on several grounds; and among others, that it did not appear that Bennett was a non-resident of the state, or even of the city of New-York; and that the prosecution had not used due diligence to obtain the personal appearance of the witness—that they ought to have sent a subpoena for him to Chautauque county. It was stated in the deposition that the witness re-

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sided in that county. The court overruled the objection, and the defendant excepted. The deposition was read, and the defendant was convicted, and sentenced to five years imprisonment in the state prison. On error brought the supreme court affirmed the judgment of the oyer and terminer. The defendant then brought error to this court.

E. Sandford, for the plaintiff in error

John McKeon, (district attorney,) for the people.

BRONSON, J. When certain offences are committed in the city and county of New-York, against persons being in, but not being residents of the city, the testimony of all witnesses in the matter, being in, but not residing in the city, may, on the application of the district attorney, be taken *de bene esse*, before a judge, out of court. The witness must be examined in presence of the accused; the examination must be reduced to writing, and filed in the office of the clerk of the court of sessions; and may be used before the grand jury, and all courts and tribunals having jurisdiction of the subject matter, in the same manner and with the like effect as the witness could be were he personally present. (*Stat.* 1844, *p.* 476, § 11.) There is another statute touching this matter, but it does not affect the present question. (*Stat.* 1846, *p.* 408, § 9.) The testimony is to be taken "*de bene esse*," or conditionally; but upon what condition, or under what circumstances the deposition may be used, the legislature has not specified. Although the supreme court felt embarrassed in *The People v. Hadden*, (3 *Denio*, 220,) by the want of such a specification, they were clearly of opinion that the deposition could not be read in evidence under all possible circumstances, or as a matter of course; but that the district attorney must give some account of the witness, or the reason why he was not produced, before the deposition could be received: and a new trial was ordered in that case, because the district attorney had been allowed to read the deposition, without sufficiently accounting for the absence of the witness.

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There can be no doubt of the correctness of the decision. But I think the court might have gone a step further, and solved the question when, or under what circumstances, the deposition may be read in evidence. As the testimony is to be taken *de bene esse*, or conditionally, without any specification of the circumstances under which it may be used, the legislature must have referred to the established practice of taking testimony *de bene esse*, or conditionally, in civil cases. Such deposition can only be given in evidence on showing that the witness is dead, insane, or unable to attend the trial in consequence of sickness or settled infirmity; or that he is absent from the state. (*The People v. Restell*, 3 Hill, 295, and cases cited; 2 R. S. 391, art. 1.) Unless we understand the legislature as referring to the practice in civil cases, the words "*de bene esse*," as they are used in the statute, will have no meaning. But with that reference, all is plain enough. The deposition cannot be read on the trial, without first showing that the attendance of the witness could not be procured, either in consequence of his inability to come, or his absence from the state.

It has not been contended, on the part of the people, that the deposition may be read under all possible circumstances. It is admitted that some account must be given of the witness. But it is said to be enough to show that the witness is a non-resident of the city, or cannot, upon diligent search, be found in it, at the time of the trial. That admission is enough to dispose of this case; for there was no proof whatever that the witness was a non-resident; and nothing like sufficient proof that he could not be found in the city. The deposition had not been read at the time this question arose; and Mr. Brennan knew nothing about the residence of the witness. He was only called for the purpose of showing that the witness could not be found in the city at the time of the trial; and there was a total failure to make out any thing like due diligence in the search and inquiry. It amounted to no more than this: Brennan, without knowing any thing himself about the witness or his residence, went to two hotels, where he was informed by the district attorney that Bennett stopped when he was in the city; and on

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inquiry, he was informed by the two bar-keepers that Bennett "was not at either of those places, and did not live in New-York to their knowledge:" which means, I suppose, that they knew nothing about the matter, either one way or the other. The district attorney was not called to state what he knew about Bennett, or why he sent Brennan to the two hotels. Some stress was laid on the concluding remark of Brennan, that he "could not find Mr. Bennett in the city." But he had previously given the particulars of what he had done in the premises; and it was far enough from a diligent search or inquiry after the witness.

This is enough to dispose of the case as it now comes before us. But as the question which has already been made, will undoubtedly be made again upon the new trial which must be ordered, it is proper that we should determine what must be shown concerning the witness before the deposition can be read. That has already been intimated. It is not enough to prove that the witness is a non-resident of the *city*, or that upon diligent search and inquiry he cannot be found in it: nor will both of those facts combined make out a proper case. Absence from the city is not mentioned at all in the statute; and non-residence is only spoken of in reference to the class of persons who are injured by the offence, and the witnesses who may be examined out of court. When we come to the question, upon what condition, or under what circumstances the deposition may be read, the statute is entirely silent, except in the use of the words *de bene esse*. If we do not reject those words as utterly senseless, they evidently point to the rule in civil cases; and the witness must be produced on the trial, unless his attendance is prevented by insanity, sickness, settled infirmity or absence from the *state*. The legislature could not have intended to make a rule more burdensome to the accused in criminal cases, than is the rule in relation to a party in a civil suit. They did not intend that the deposition should be read when the witness resides at Brooklyn, in sight of the New-York city hall; and yet such is the result of the doctrine which has been urged on the part of the prosecution.

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If this question were more doubtful than it is, it should be borne in mind, that upon any construction, this is a statute in derogation of the common law rules of evidence; and that it violates a principle which was thought of sufficient importance to be adopted as a part of the sixth amendment of the constitution of the United States, and also forms a part of our bill of rights, in these words: "In all criminal prosecutions the accused has a right to be confronted with the witnesses against him." (1 R. S. 94, § 14.) This means something more than that the accused shall have the right to stand face to face with his accuser out of court; it means that they shall be confronted on the trial, so that the judge and jury may have the opportunity of observing the appearance and manner of the witness, as well as hearing what he has to say—the former sometimes proving a complete antidote to the latter, as is well known to every *nisi prius* lawyer. We cannot very well over-estimate the importance of having the witness examined and cross-examined in presence of the court and jury. Although the constitution of the United States does not apply to state prosecutions, and our bill of rights is but a statute, which, like other statutes, may be repealed, we ought to adopt the most strict construction for the purpose of confining any supposed repeal—especially one by mere implication—to the narrowest possible limits. Justice to the legislature requires that we should so construe the statute as not to carry the inroad which, to some extent, it makes upon a great principle, any further than is absolutely necessary.

I am of opinion that the rule which governs the reading of depositions taken conditionally in civil cases, should be applied to depositions taken under the New-York criminal statute. Upon this construction the statute will still have effect. It will apply wherever the witness, at the time of the trial, resides out of the state, or is dead; and where, though alive and residing in the state, he has become incapable of attending the trial in consequence of sickness or insanity.

But a majority of the judges are of opinion that though the witness may be a resident of the state, and able to attend the

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trial, the deposition may be read on proof that he is a non-resident of the *city* at the time of the trial, and was so when the deposition was taken. We are all of opinion that there was no sufficient proof of such non-residence in this case; and on that ground the judgments of the supreme court and theoyer and terminer must be reversed, and a new trial be awarded.

Ordered accordingly.

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132	409

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The losing party in an illegal bet or wager may recover from the stakeholder the sum deposited by him, although the stakeholder by his direction, given immediately after the wager is determined, has paid the money over to the winner.

An action to recover money deposited on an illegal wager may be maintained without demand.

A wager upon the result of a horse race in Queens county is unlawful, notwithstanding the statutes authorizing and regulating the racing of horses in that county.

A party who stakes a sum of money on an illegal wager may recover so much thereof as belongs to himself without joining in the action other persons who contributed specific portions of the fund.

ERROR from the supreme court, where the action was debt, brought by Ruckman against Pitcher, for money had and received contrary to the provisions of the statute against betting and gaming. The defendant pleaded *nil debet*, and the cause was tried at the New-York circuit held by KENT, circuit judge, in October, 1844. The case was this: The plaintiff made a bet of \$3000 with one Minturn on the event of a trotting match to take place at the Centreville course on Long Island, and the money on both sides was deposited with the defendant as stakeholder. Minturn won the wager and immediately after requested the defendant to pay over to him the money. The defendant then asked the plaintiff, who was present, if he had any objection to the money being paid over and whether he was satisfied. The plaintiff replied that he was satisfied, and

directed the defendant to pay over the money, which he accordingly did. The evidence tended to show that other persons besides the plaintiff were interested in the money staked by him, and that in fact only \$500 belonged to him.

The counsel for the defendant requested the circuit judge to charge the jury that the defendant was entitled to a verdict on the following grounds, viz. 1. That other persons being interested with the plaintiff in the money bet, the action was not properly brought in the name of the plaintiff alone; 2. That the race was not unlawful, being on a regulated course in Queens county, and authorized by the act of 1834; 3. That the money when lost was paid over by the consent and direction of the defendant; 4. That the plaintiff could only recover, if at all, the amount he was proved to be interested in the bet, to wit, \$500; 5. That the action could not be maintained without proof of a demand of the money. The circuit judge charged the jury, that if the money was paid over by the consent and direction of the plaintiff, he could not recover. On the other points the charge was favorable to the plaintiff. The jury found a verdict for the defendant. The plaintiff made a bill of exceptions and moved the supreme court for a new trial, which was denied, and judgment rendered for the defendant.

J. T. Brady, for plaintiff in error. The circuit judge erred in charging the jury that the plaintiff could not recover if the money staked had, after the race, been paid to Minturn *as the winner thereof*, with the consent and by the order of the defendant. The revised statutes (1 R. S. 662, §§ 8, 9, 16) make the stakeholder liable, whether he has or has not paid over the money to the winner. His liability arises from merely having the stakes in his possession. In paying over the stakes to the winner he knew that he was violating the law, and that his liability to refund to Ruckman continued notwithstanding such payment. The consent to such payment could not make it legal, nor relieve the stakeholder from liability. There was no legal nor moral consideration for the transfer of the plaintiff's money. On the contrary, it was transferred in violation of the law.

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Any other rule would defeat the intention of the legislature, and destroy the utility of the statute against betting and gaming. The consent after the race, should not create any right, or change any liability, more than the consent involved in the wager itself, viz. that the stakeholder might deliver the stakes to the winner. (*Rev. Notes*, 3 R. S. 2d ed. p. 555, § 9.) There is no room for the argument that this was a voluntary gift of the money by Ruckman to Minturn like an ordinary donation. It was paid by a stakeholder, as the stakes of an unlawful wager, to the winner as such, with the consent of the loser, and in illegal satisfaction of the bet. To recognize the defendant's position on this point would be palpably circumventing the policy of the law.

If this court consider the other questions in the case, the plaintiff insists that this suit was properly brought in the name of Ruckman alone, he being the person who delivered the money to the defendant, and had the legal interest to demand it back. (1 *Chit. Pl.* 2, 9, *Springf. ed.* of 1839.)

Whether the race in question was or was not lawful, the wager upon its issue was void. (*Gouverneur v. Gibbons*, 1 *Den.* 170.)

The ninth section of the revised statutes gives the *right* of action, *instante*, on the deposit being made with the stakeholder—not after demand made. To require a demand of the deposit from the stakeholder after he has paid it over would be absurd. No demand before suit brought was necessary. (*Downes v. Phenix Bank of Charleston*, 6 *Hill*, 297.)

N. B. Blunt, for the defendant in error.

JONES, J. It is claimed to have been shown, on the trial of this cause, that the race was run upon a regulated course in Queens county, in full accordance with the special statutes exempting certain races in that county from the prohibitions and penalties of the general statute on the subject of the racing of animals; (*Stat.* 1834, *ch.* 73; *id.* 1821, *ch.* 193;) and hence it has been insisted, that as the race itself was lawful under those statutes, the same statutes permitted and sanctioned the bet or

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wager upon the result of the race. I understand the supreme court to have held that the wager was illegal, as coming within the general statute against betting and gaming, although the race itself was licenced by the special acts referred to, and I fully concur in that opinion. The argument in favor of the defendant in error is, that as the general statute relating to the racing of animals, prohibits such racing *for any wager, bet or stakes*, and the exempting acts allow the racing of horses on particular courses freed from the provisions and penalties of the general prohibitory act, it is therefore not illegal to wager money upon the result of the permitted race. It is evident, I think, that the only effect of the special statutes is to exempt the race itself from the penalties of the general law against racing, leaving the general statute which prohibits betting and gaming to have its full operation upon the wager on the event of the race. The statute against the racing of animals declares all running, trotting, &c. for any bet or stakes, except such as are allowed by special laws, common and public nuisances and misdemeanors, and that all parties concerned therein shall be deemed guilty of a misdemeanor, and shall be punished by fine or imprisonment. (1 R. S. 672, § 1; 1 R. L. 222, §§ 1, 2, 3, 4, 6.) The act against betting and gaming, (1 R. S. 662; 1 R. L. 223,) declares unlawful "all wagers, bets or stakes, made to depend upon any race, or upon any gaming by lot or chance, or upon any lot or chance, or unknown or contingent event whatever, and that all contracts for or on account of any money or property or thing in action, so wagered, bet or staked, shall be void." These statutes relate to different subjects, contain distinct and separate provisions, affording different remedies, and imposing different penalties, as will be seen on a reference to the sections under each article. While, therefore, the special acts which have been referred to, may exonerate the parties concerned in the race in question from the provisions and penalties of the act against the racing of animals, I see no reason to doubt that the wager upon the result of the race comes fully within the provisions of the act declaring all wagers unlawful, and all contracts relating to them void.

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The payment of the money over to the winner by the *consent and direction of the plaintiff*, constitutes the principal ground of defence. It is claimed for the defendant that he is discharged thereby from all liability to return or pay back to the plaintiff the money thus paid by his order to the winner. The plaintiff is bound, it is said, by his own act, and is precluded and estopped by his consent and direction to the stakeholder to pay the stakes to the winner, and the payment over of the same by the stakeholder, in obedience to such direction, from now claiming the money as being still his own, and coercing the payment of it by the stakeholder to himself. But how can that rule be claimed to apply? The question is not upon the abstract rights and obligations of parties left free to contract, consent and act for themselves, and bound by their admissions and acts. The liability of the stakeholder to the loser, and the loser's right of action against him, rest upon the statute. The legislature has prescribed the rules which are to govern the case, and our inquiry must be what the rules are which the statute intends to apply.

In the first place, the fact simply of the payment over of the stakes to the winner, can certainly be of no avail to the stakeholder, for the statute on that point is perfectly clear and explicit. It expressly enables and authorizes any person who shall pay or deliver or deposit any money or property upon the event of any wager or bet thereby prohibited, to sue for and recover the same of the winner or person to whom the same shall be paid or delivered, and of the stakeholder or other person in whose hands the same shall be deposited, whether the same shall have been paid over by such stakeholder or not, and whether the wager was lost or not. In the present case the stakes were paid over by the stakeholder to the winner, and evidence was given to show that such payment was with the consent and by the direction of the loser, and the question must be upon the effect of such consent and direction as the proof shows to have been given, upon the claim of the loser and the obligation and liability of the stakeholder. In other words, whether the consent and direction of the loser to the stakeholder

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to pay over the bet or stakes to the winner, and the actual payment over of the same under that direction varies the case, and deprives the loser of the right the statute gives him to reclaim and recover back the same of the stakeholder who has thus paid it over.

It is contended, on the part of the defendant, that the statute applies to voluntary payments only of the stakes by the stakeholder to the winner, without the direction or assent of the loser, and not to payments by the order or with the consent and permission of the depositor. And it is urged that if the money or stakes, notwithstanding the result of the race, was still the money of the depositor, and at his disposal, his order to the stakeholder to pay it to the winner was a valid disposition of it obligatory upon the stakeholder, and which the loser could not be permitted to revoke or disregard. To this the counsel for the plaintiff replies, that the statute gives to the loser the unqualified right to sue for and recover his stake or deposit of the stakeholder, whether such stake or deposit has been paid by the stakeholder to the winner or not; that the right to recover is absolute, and previous payment to the winner is no defence. The clear and obvious import of the language of the statute is that the payment of the stakes or deposit by the stakeholder to the winner, does not discharge or exonerate him from his liability to pay the same to the loser, who has a perfect right, notwithstanding such payment to the winner, to recover the same from the stakeholder. There is no provision made or intimation given by the statute, that the consent of the loser to such payment, or his direction to the stakeholder to pay the same to the winner, shall give effect to such payment as a discharge to the stakeholder, or a bar to the loser's action against him. And in my judgment, any construction of the statute which should limit and confine its application to voluntary payments of the stakes by the stakeholder to the winner, and allow such payment over, when by the order or with the consent of the loser, to be valid and effectual as a discharge to the stakeholder, and a defence for him to the action of the loser, would contravene the sense and policy of the statute, and materially

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impair the value of the provisions on which its successful operation must depend.

I agree that in ordinary transactions the order or direction of a person having money in the hands of another, to pay it to a third person, will authorize and justify him in whose hands the money is, to pay the same on such order, and that such payment will be a perfect defence for the party who has thus paid it over, against any claim or action therefor by the owner. But this was not the ordinary case of the direction of a person having money in the hands of another to pay it to a stranger or third person. It was the consent of a loser of a bet to a stakeholder to pay that bet to the winner. It was given by the loser on the race-course upon the authoritative announcement of the result of the race, and on the application of the stakeholder to him for permission to pay over the stakes to the winner, as being won by him. The very time and place when and where the application was made, and the consent given, characterize it as a mere assent and acquiescence of the loser in the loss of the bet, and the right of the winner to it, and the consequent authorization of the loser to the stakeholder to pay it over accordingly. Look at the transaction as narrated by the witness. The whole alleged direction was simply this: On the application of Minturn the winner, to Pitcher the stakeholder, upon the decision of the judge that the race was won by Americus, for the stakes as won by him, Pitcher, the stakeholder, called Ruckman, the loser, who was on the ground, and asked him "if he had any objection to handing over the money, and if he was perfectly satisfied." He replied that "he was," and "to hand over the money." What was this reply to the stakeholder's question more than a mere assent of Ruckman, the loser, to the decision of the judge as to the result of the race, and that his bet upon it was lost by him, and that the stakes were to be paid to the winner? The consent and direction given were to pay the money to Minturn, as money won by him, and to which he was entitled as the winner. It was in no sense of the terms a direction by the plaintiff in error to the defendant to pay money in his hands belonging to him,

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the plaintiff, which he had the right and the power to dispose of as he saw fit, and which was subject to his order in favor of Minturn, or any other person, at his own free will and pleasure. It was distinctly and emphatically an acknowledgment by him that the money belonged not to himself, but to Minturn, and was in the defendant's hands as the money of Minturn, and to be paid to him. It was simply a consent, or at most, an order by the loser on the stakeholder to pay a bet lost by him to the winner. He had before, by the deposit of the money in the hands of the stakeholder as his stake upon the event of the race, virtually authorized and directed him, the defendant, to pay over the same to the winner, in case the bet should, by the result of the race, be lost by him. The direction given by him in his answer to the question put to him by the stakeholder after the race was decided against him, to hand over the money to the winner, was simply the recognition and repetition of the authority before given by him when he made the deposit "to pay over the same in case of loss." But that consent and authority thus given to the stakeholder at the time of the deposit of the stake in his hands, to pay the same to the winner, the statute intended to cancel and annul. It was effectually annulled by authorizing the loser, in disregard of it, to sue for and recover back his deposit after the loss of the bet, from a stakeholder who had paid it over to the winner, notwithstanding such payment of it over by him. I can discover no evidence in the bill of exceptions before us, of any assent or order of the plaintiff to or for the payment over of the money, which does not refer to his express or implied instructions to the stakeholder at the time of the deposit, or was not manifestly in compliance with the contract of wager, and for the fulfilment of engagements it imported. And if I am right in my views of the statute, neither any express directions given at the time of the deposit, nor the implied authority incident to the deposit of the money with the stakeholder, as the stake upon the race, nor the repetition or renewal of that authority after the race was run and the bet decided, nor an assent, order or direction given at the time when the loss of the bet was announced, to pay

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over the stake to the winner, can be available as a defence to the action of the plaintiff for the recovery of the deposit.

The evident intention of the legislature was to discourage and repress gaming in all its forms, including bets and every species of wager contracts of hazard, as a great public mischief, calling for effective measures of prevention and remedy. Under our system of jurisprudence, as it existed previous to the revised statutes, wagers not against morals or sound policy, and of no evil or pernicious tendency, and not prohibited by statute, were held not to be illegal; but all wagers and bets which are contrary to morality or public policy, or which tend to endanger the public peace, or affect the character or feelings of the citizen, or are otherwise of evil tendency, as well as those which were prohibited by statute, were held to be illegal and void; and no action at law could be maintained by the winner against the loser to recover the money bet or wagered, however fairly as respected the chance or hazard, and the issue or event of it, the same might be lost and won. If, however, the money or bet, not recoverable by law, was voluntarily paid by the loser to the winner, no action could be sustained by the loser to recover it back; for the wager being illegal and the contract void, and the winner and loser both implicated in the illegality, the law would lend its aid to neither against the other for consummating or giving effect to any alleged right or claim growing out of the same, or in immediate connection therewith, but would leave the party in possession of the fund or money, to retain and hold it against the other; not from favor to the possessor, or from respect to *his* as the superior title thereto, but from disfavor to the illegal transaction, and in support of the statute or common law prohibition of it. This denial to the winner of the aid of legal process against the loser, for the compulsory payment of the bet to such winner, when won by him, was calculated, and doubtless tended to discourage wagers and bets understood to be illegal. But it was counteracted by causes which the laws could not reach or control. The loser, under the pressure of influences too powerful for him in the excitement of the race or game to withstand, would most generally,

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on the decision of the bet, pay the money lost to the winner. But instances would occur of losers who would avail themselves of the defence and protection which the law, in refusing its aid to the winner, furnished them against the payment of the bet. It was of course desirable and important to betters to guard against the exercise of this power of the loser thus to repudiate and render abortive the right and claim of the winner to the money won of him; and the readiest and most reliable measure of protection against it, was the intervention of a stakeholder, with whom the stakes should be deposited and placed for custody and for delivery over to the winner on the result of the race or game. The stakeholder would have no personal interest in the stakes to swerve him from his engagement and duty to pay the same over to the winner; and the money, when thus paid over to the winner, would be secured to him beyond the power of the loser to reclaim it or recover it back. But under this arrangement it was a point still unsettled, whether the loser could not, in the interval, after the loss of the bet, and before the payment of the money to the winner, reclaim his stake and sustain an action against the stakeholder for the money so deposited with him. It was a question which underwent much discussion, and on which opinions were divided. In England the rule was finally settled that when money was thus deposited with a stakeholder on an unlawful race or game, and had not been paid over by him, the loser might, after the event on which the bet was made to depend had happened, and was known, recover back the stake or money so deposited with and yet remaining in the hands of the stakeholder; but that when such stake or money had been, after the loss of it, paid over to the winner with the loser's consent, the loser could not afterwards maintain an action against the stakeholder to recover back such deposit.

The decision on the point was at first the same way with us. The question came before the supreme court of this state in the case of *Vischer v. Yates*, (11 *John. Rep.* 23.) The action was by the loser against the stakeholder, to recover back his deposit on a wager or bet upon the election for governor of

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the state, which had resulted adversely to the plaintiff, and his bet was lost ; but the stakes had not been paid over by the stakeholder to the winner, and Chancellor Kent, who was then the chief justice of that court, was of opinion that the wager was illegal as being against public policy, and he held, in accordance with the English rule, to which he adverted in terms of approbation, that the deposit, being upon an illegal wager, and remaining still in the hands of the stakeholder not paid over to the winner, might, though the bet was decided against the plaintiff, be recovered back by him of the stakeholder ; and the other members of the court concurring with him in opinion, judgment was rendered for the plaintiff. There were several actions then pending in the same court, involving the same questions, and judgments were given for the plaintiffs in them all. But on a review of that decision by the court for the correction of errors, in one of those cases (the case of *Yates v. Foot*,) the judgment was reversed ; and that court held that money deposited with a stakeholder as stakes, upon a wager void by the common law, could not be recovered back from the stakeholder by the depositor after the event had happened on which the wager depended, although it remained still in his hands not paid over, and he had notice from the loser not to pay it over to the winner. Senator Sanford, who delivered the opinion on that occasion, states the rule to be, that in cases of illegal wagers and contracts of hazard, void by the common law, and which either party might rescind, the party who elected to rescind must make his election, and take his action upon it before the contingent event happens, for that the happening of the event is the crisis in the contract which terminates all option and election of the party to revoke or rescind it ; that before the contingency happens, either party may recede, but that after the result is known, neither party can retract ; and applying the principle to the case then before him, he held that as the hazard had ceased and the result of the election was known, no action could be allowed or maintained to recover back the money or stake in the hands of the stakeholder. On these grounds that court decided that the loser could not recover

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back his deposit. The statutes against gaming and horse racing were then subsisting and in force, but the wager then in question did not come within the provisions of either of them. And it was admitted by Senator Sanford that the rule deduced by him from the principles of the common law, did not apply to cases of gaming and horse racing. These two species of contracts of hazard, he observed, had been made the subject of special legislation; that they were the only classes of hazardous contracts in which the loser was allowed to reclaim and recover back the money he had wagered after the event was known and the wager lost; and that the object of the legislature was to suppress them, evidently on the grounds of public policy. This decision was in 1814, and as the law of this state was thereby declared to be, the better who deposited money with a stakeholder on an unlawful wager, not within the prohibitions of the statutes against gaming or horse racing, could not, after the bet was lost, recover back his deposit; and whether the money had been paid over to the winner by the stakeholder, or remained in his hands, was of no consequence; the loser could in neither case, after the loss of the wager, maintain an action against the stakeholder for it. The bet therefore, though illegal, if in deposit with a stakeholder true to his trust, was under no effectual legal restraint or interdiction, unless it was within the scope of the statutes against gaming or horse racing. These statutes professed and were intended to suppress the mischiefs to which they referred, but they differed greatly in the extent of the provisions they contained, and the efficiency of the remedies they applied, for the purposes intended. The statute against horse racing expressly prohibited all horse racing for wagers or stakes within the state; and the penalties affixed to the offence were so severe and stringent as to ensure to a moral certainty the suppression of the mischief. But the statute against gaming fell far short of that against horse racing in efficiency. It professed to be "An act against excessive and deceitful gaming," and it contained some wholesome provisions. It repressed and punished with due severity all deceit, fraud, cheating and unfair practices in the species of gaming it prohibited, and in

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etting upon the game; but its provisions against bets and gaming, as being themselves illicit, and intended to be repressed, were not sufficiently comprehensive and coercive to make them effectual. The statute provided and declared that all securities and conveyances for money or property won by play at any game, or by betting thereon, or bet or advanced for those purposes, should be void, and losers to the amount of \$25 at any one time or sitting, who should pay the same, were enabled to recover back the same at any time within three months, from the winner, with costs. By the 5th section of the statute to prevent horse racing, and for other purposes, subsequently passed, it was in substance further provided, that all contracts for, or on account of, any money or other thing bet, or staked, or depending on any such race, (referring to the race before mentioned in the statute,) or concerning the same, or for or on account of any gaming by lot or chance, of any kind or description, should be deemed and adjudged void, and that it should be lawful for any person who might have paid any money or other thing upon the issue or event of any such race or game, to recover the same in like manner as provided in the 2d and 3d sections of the act entitled an act against excessive and deceitful gaming. And by those sections of that act the action was to be brought within three months, and was to be against the winner. These provisions and penalties were thus limited to the species of gaming by play at any game, or by lot or chance; to bets upon such gaming, and to money lent for those purposes; and the action given to the loser was limited to three months, and to be against the winner only—provisions of much importance and use indeed, but obviously inadequate to the suppression of the offences they were intended to prohibit and prevent.

The revised statutes which went into operation in 1830, fully supplied the deficiency, and indeed have gone the whole length of prohibiting all wagers, bets, and stakes upon any contingent or unknown event, with the exception only of contracts of insurance, and upon bottomry and respondentia, and have enabled the loser to recover the money wagered and lost, not only of the

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winner, but also of the stakeholder, notwithstanding that he may, after the loss of the bet, have paid the same over to the winner. It was manifestly the intention of the legislature to suppress and prohibit every species of wager and bet, either upon the racing of animals, or upon any contingent or unknown event whatsoever, other than the contracts expressly excepted, and to abolish all distinction between lawful and unlawful wagers, and make them all invalid and void. As one of the best and surest means of accomplishing that end, the provision was adopted enabling and authorizing the loser to sue for and recover back his stake or deposit from the stakeholder, whether the race or game may have been lost or not, or the money paid over to the winner or not. Anterior to the revised statutes, questions were liable to occur upon the legality of the wager, and the provisions and penalties applied by the laws to the preventing or the suppression of those adjudged to be unlawful, might be evaded by the betters, or might prove inadequate to the effectual restraint of the offence. And the action given by the statutes to the loser to recover back the money lost and paid by him, was too limited and defective to be, for any purpose, a reliable remedy. For the provision giving the action limited the time for the commencement of it to the short space of three months, and applied it to the winner, without any notice of the stakeholder or reference to him. The remedy thereby, upon a strict construction of the act, would be against the winner alone; or if the terms of the 5th section of the act against horse racing admitted of an exposition sufficiently broad to include the stakeholder, in the cases to which that section refers, as being a party to whom the loser had paid the money he sought to recover back, the action for it, against him, to be effectual, must be brought before the same was in good faith paid over to the winner. And it is quite obvious that the payment over of the stakes to the winner may be made so promptly upon the decision of the race or game, as not to allow sufficient time to the loser to arrest it, by his action, in the hands of the stakeholder, and that the loser's recourse to the stakeholder would thus be frustrated.

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But under the provisions of the revised statutes, those difficulties and doubts cease to exist. The article entitled "of betting and gaming," is general, comprehensive and explicit. It embraces and embodies the pre-existing restraints upon betting and gaming, with the further provision making the stake or deposit of the loser recoverable by him of the stakeholder, either before or after the loss of the race or game, notwithstanding that the same may have been paid over to the winner, and whether the same has been thus paid over or not. This further provision thus rendering the payment over of the stake to the winner of no avail to the stakeholder as a defence to the action of the loser against him under the statute for the recovery of it back, gives to the present system a decided advantage over that which preceded it, for suppressing the obnoxious practices of betting and gaming. And if full effect be given to it, and it shall be fairly applied and carried out, it must have an efficient agency in the accomplishment of the purposes of the statute. But to give it that effect, the loser's assent to the payment over of the stake, or his order directing it, must not be allowed to affect the stakeholder's liability: for when the wager is upon an event or contingency unknown to both the parties, and the result is uninfluenced by either of them, and no deception, fraud or unfair practice is imputable to the winner, the loser will very rarely dissent from the payment of the stake to the winner; but will, when present and called upon for his consent, usually acknowledge the winner's claim, and authorize the payment of the stake for him by the stakeholder accordingly. To allow such consent and authority of the loser, so given by him, to be a sufficient warrant to the stakeholder to pay over the money, and an effectual defence to the action of the loser against him, would be to open the door to evasions of the statute, which would essentially impair its provisions and render it altogether inadequate to the purposes for which it was intended. The statute, to be effectual, must be construed and held to provide that no payment of the stakes by the stakeholder to the winner, either without the consent of the loser or with such consent, shall be a defence for the stakeholder to the

action of the loser against him for the same. That such was the intention of the framers of the statute, the defects in the pre-existing laws which the further provision of this statute was intended to supply, the remedy it provides, and the language it employs, appear to me to fully and clearly evince. It was the agency and concurrence of the loser in giving effect to the illegal contract of wager, and chiefly the consent and direction so habitually given by the loser, to the payment of the stakes to the winner, which under the former system rendered the provisions of law against betting and gaming so ineffectual; and it was to provide a remedy for that evasion of the former statutes, that the action was given to the loser in its present amplitude, vesting in him the unqualified right to recover back his deposit from the stakeholder who had paid it over to the winner. The language of the statute giving the action is full, clear and explicit; the right to sue for and recover the deposit of the stakeholder is unconditional, and applies to all cases of deposits and stakes, whether the bet is lost or not, or the stake is paid over or not. The statute makes no exception of payments with the consent or by the order of the loser, and the court can make none.

It is incorrect and unjust to predicate of this denial of effect to such consent of the loser of the bet, that it encroaches upon his right to the free disposition of the fund, or interfered with his power over it. He had a perfect right and was at full liberty to dispose of it as he pleased, and to order and direct it to be paid by the defendant to any person whomsoever, other than the winner as being entitled thereto on the ground that he had won the wager. The plaintiff in error, being the owner of the money, had the right to call upon the stakeholder for it himself, or to dispose of it to others, and order and direct the payment of it to them; and the payment of it to such order by the defendant would be perfectly regular, and would discharge him from his liability therefor to the plaintiff. But the plaintiff in error, as loser, could not direct the payment of the stake to the winner as being won by him. Such order and direction, and the payment under it, would be in consummation of the un-

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lawful bet, and if permitted would give effect to the contract which the statute declares to be void.

If such order and direction of the loser to the stakeholder to pay over the stakes to the winner, could have the efficacy ascribed to it by the defendant in error, it must be either because the payment over of the money is by such consent and direction authorized and made a legal and valid payment, or because the loser who gives it precludes himself thereby from afterwards contesting its validity or asserting a claim to the money after his waiver of his right to it, and in disaffirmance of his own disposal of it to another person. In questions between parties to contracts and transactions, on common law principles, where no statute rule intervenes, those grounds of objection to a plaintiff's right of action would be available, and might be conclusive. But in the application of statutory provisions, the rules given by the statute are to govern. The statute under consideration, which makes the wager illegal, and the contract void, implicates the stakeholder in the illegality; and to render the remedy it provides against him effectual, authorizes and enables the depositor to recover back a stake deposited with him as stakeholder, after he has paid it over, and notwithstanding such payment. He therefore cannot exonerate himself from his liability to the action of the loser for the deposit, by paying the money over, but must continue, notwithstanding such payment, amenable to the loser for it. And any consent or order of the loser to him to pay it over, as it contravenes the spirit and intention of the statute, and tends to impede its operation and frustrate its design, must be nugatory and inoperative.

In the case of *Lewis v. Miner*, (3 Denio, 103,) it was contended that the loser, by the payment or delivery over of the money or thing wagered, consented to part with the property, and had no remedy by the common law to recover it back. Such was admitted to be the common law rule, but the court held that the statute nullifies the consent, and gives the loser a remedy by action. The demand was there against the winner; but the question was on the effect of the consent of the loser to part with his property, and upon his right of action to recover it

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back ; and the opinion expressed by the chief justice was, that the statute "nullified the consent," and gave the loser a remedy by action. How are we to distinguish that case in principle from this? The point was that the statute nullified the consent of the loser to the payment of the wager when lost to the winner. And if the payment of it direct to the winner is nullified, must not the consent and direction to the stakeholder to pay it over be equally inoperative and void? The stakeholder is the agent of the better, and takes the money deposited in his hands as the better's stake, under the express or implied engagement to pay it over when lost and won, to the winner. If the wager had been lawful, and the contract valid, he would need no other or farther assent, order or authority from the loser to pay it over ; or if the statute had left the stakeholder at liberty to fulfil his engagement, and had not interdicted the payment of the stakes to the winner, such payment would have exonerated him from his liability. But the statute, by giving the loser an action against him for the money, after the payment of it over by him to the winner, has, in effect, interdicted such payment over, and made the same ineffectual and of no avail to him as a defence to the action of the loser against him. The authority given by the original deposit to pay over the stake upon the loss of the bet to the winner, is necessarily nullified by the provisions of the statute giving the loser a remedy by action to recover it back ; and the repetition of that authority by the consent and direction given immediately after the loss, to pay the same over, cannot surely give validity to a payment which the statute thus impliedly interdicts. Such subsequent consent and direction is in effect nothing more than the affirmance of the contract and authority created and given by the original deposit, and an order and direction to fulfil and perform it in disregard of the statute.

In the case of *Ruckman v. Bryan*, (3 Denio, 340,) the defendant had borrowed a sum of money of the plaintiff to bet on a horse race, which had been deposited with a stakeholder, by whom the same, on the decision of the race, had been paid over to the winner. The defendant, who was the borrower, had

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afterwards promised to pay the loan to the plaintiff; and action was by the lender against the borrower for the money. The court wholly disregarded the subsequent promise of the borrower, made after the loss of the race, to repay the loan; and held such loan to be illegal, and the money lent irrecoverable by the lender of the borrower. So here, the payment over of the stakes by the stakeholder to the winner, being in itself inoperative as a discharge of his liability, the consent or direction of the loser to him to pay the same over, could not impart to it the force and validity of a duly authorized and available payment. Such payment of the money wagered, by the stakeholder to the winner, on the ground that he had won the wager, whether with or without the consent and direction of the loser, is the payment of an illegal bet, in consummation of an unlawful and void contract. The order or direction of the loser to the stakeholder to pay it, cannot and does not change the nature or character of the payment. And no such consent or direction can, in my judgment, be a defence for the stakeholder against the action of the loser given to him by the statute. Such, I understand to be the rule laid down in the case of *Lewis v. Miner* as applicable to the case of an action by the loser against the winner. And it appears to me to be equally applicable to the case of an action against the stakeholder.

I am, however, not to be understood to hold that the money wagered and deposited with a stakeholder can, under no circumstances, be directed by the depositor, after the loss of the wager by him, to be paid to the person with whom the bet was made; but if such direction of the loser can, consistently with the terms and policy of the statute, be allowed in any case, (other than an actual bona fide purchase,) to avail the stakeholder for his justification, it must surely be on the ground that such consent and direction have been freely given for the payment of it, not as money to be paid over to a winner as a stake won by him, and thereby become his money, but as money of the loser, directed by him to be paid to the winner, not as having any right to it, but as the free and voluntary gift and gratuity of the loser to him. It would be highly improbable,

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I will not say impossible, that any such case should ever occur, and in perfect good faith exist. And I hold it to be clear that no consent or order of the loser to pay the money or stakes lost to the winner, *as money won by him*, can in any case give the winner any claim thereto, or the stakeholder any right or authority to pay the same to him. The stakeholder can consequently avail himself of no such consent or direction as an authority to him to pay the loser's deposit to the winner as money or stakes won by him on the issue of the race or game, nor claim the benefit of such payment as a defence to the action of the loser against him for the deposit.

In this case it is admitted and avowed that the money was paid by the defendant to the winner as money won by him on the race. The judge, in his charge to the jury, instructed them that if the money was paid to Minturn after the race, as winner of the stakes, by and with the approbation and consent, and upon the order of the plaintiff, such payment was a bar to the plaintiff's right of action against the defendant. This direction, in our view of the law was clearly incorrect, and vitiates the verdict. The jury could not, if guided by it, find otherwise than they did. The proof was full and clear that the money was paid to Minturn after the race, as winner of the stakes, with the consent of the plaintiff in error, given on the race-course at the time the race was run and the result announced. It was paid as money lost, and received as the stakes won upon the race. Such payment must, I think, be deemed as fully within the provisions of the statute, as a payment by the loser himself to the winner would be.

But again, it is objected that as the payment of the stakes by the stakeholder to the winner gives the loser a right of action against the winner for the recovery of the same from him, the proper resort of the loser is to him, and recourse cannot be permitted to the stakeholder also, as a double satisfaction might thereby be obtained. It is a sufficient answer to this objection, that the statute in express terms authorizes the loser to sue for and recover his deposit or stake of the stakeholder, whether he has paid the same over to the winner or not. The loser, as-

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suming that he would be confined to one satisfaction, might surely have concurrent remedies therefor, against both the stakeholder who paid over the stake, and the winner to whom it was paid, and be entitled to take his remedy against either of them, and against the stakeholder in the first instance. He consequently must have the right to prosecute his action against such stakeholder to judgment and execution, and could not be turned round to his action against the winner, and thus be driven to a remedy against a party who might be irresponsible and unable to pay. Whether the loser would have the right to pursue the winner after a fruitless recovery against the stakeholder, or be entitled to other or double satisfaction, are questions with which we have nothing to do in this action. If he is restricted to a single satisfaction, and obtains it in his action against the stakeholder, the fact of such satisfaction so obtained in such suit would be available to the winner as a defence to an action for the same cause against him.

The objection of the non-joinder of other parties having an interest in the bet, as plaintiffs, assumes that others were interested with the plaintiff in error in the bet, and that their interest made them necessary parties to the suit. It does appear that the money wagered and staked did not belong wholly to the plaintiff in error. Two of the witnesses testify to contribution by them to make up the sum, one to the amount of \$100, the other to \$50, and each of them states that he paid to the plaintiff his contribution, and avers that he had not authorized this suit for his part of the stakes. There may have been other contributors, who, or some of them, may have paid their contributions; and as respects some of those shares and interests in the deposit, the right of the plaintiff in error to recover may be questionable: but if the shares of those who disapproved acting are to be disallowed, and even if in addition thereto the interest of all other contributors shown to have an interest in the bet are also to be excluded, the plaintiff in error would still be entitled, if his action was otherwise maintainable, to recover the residue of the sum wagered and bet shown to belong to others. And so the judge in effect decided; for he instructed the jury

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that the plaintiff, if entitled to recover, was entitled to recover the amount of the money bet and lost by him, less the two sums of \$50 and \$100, belonging to persons who had not authorized the suit.

But it is further objected that no demand is shown to have been made of the return or repayment of the money before the commencement of the action. The answer is, that no demand was necessary. The statute makes the stakeholder liable absolutely and at all events, and gives the loser an immediate right of action against him. No demand could be necessary; especially in a case like this, where the money had been actually paid over to the winner. Whether a previous demand would have been necessary or proper, if the action had been brought before the race was run, and when the event on which the bet depended was still contingent and undetermined, or the action might even in that case have been brought and maintained without any previous demand, it is not necessary now to inquire, for this defendant has actually paid over the stakes to the winner; and as such payment over was, in our view of it, without sufficient authority and in his own wrong, he made himself liable to an immediate action against him, and a previous demand, if otherwise proper, would be unnecessary. The judgment must be reversed.

Judgment reversed.

BRONSON, J. dissented.

THE CAYUGA COUNTY BANK vs. WARDEN and GRISWOLD.

Due presentment for payment and notice of non-payment are conditions precedent to the liability of an endorser of a promissory note.

No precise form of words is necessary in giving notice. It is sufficient if the language used is such as to convey, either in express terms or by necessary implication, notice to the endorser of the identity of the note, and that payment, on due presentment, has been neglected or refused by the maker.

Where a notice misdescribes the note in some particular, it may be shown in aid of the defect that there was no other note in existence to which the description contained in the notice could be applied.

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A notice of protest need not in terms state that a demand has been made upon the maker. It is sufficient if it state that the note has been protested for non-payment. The defendants were endorsers upon a note for \$600, payable to their joint order at the plaintiffs' bank. The notices of protest were dated at the bank on the last day of grace, and were addressed to the defendants severally. They had the character and figures "\$600" in the margin. In the body they ran thus: "Sir; take notice that S. Warden's note for *three hundred* dollars, payable at this bank, endorsed by you, was this evening protested for non-payment, and the holders look to you for the payment thereof." It was proved that there was no other note in the bank made by S. Warden and endorsed by the defendants. *Held*, that the notice was sufficient to charge the endorsers.

ERROR from the supreme court, where the action was assumpsit, tried at the Cayuga circuit before MAYNARD, J. in January, 1848. The plaintiffs claimed to recover the amount of a promissory note made by S. Warden and endorsed by the defendants, in these words:

"\$600. Ninety days after date I promise to pay to the order of F. L. Griswold and E. A. Warden six hundred dollars for value received, at the Cayuga County Bank.

Auburn, N. Y. January 30, 1848.

S. WARDEN.

(Endorsed) F. L. Griswold.

E. A. Warden."

The note at its maturity was in the plaintiffs' bank, and was protested for non-payment. A notice of protest was served on each of the defendants, addressed to them severally, and was in these words:

"600. Cayuga County Bank, Auburn, May 3, 1845.

Sir: Take notice that S. Warden's note for *three hundred* dollars, payable at this bank, endorsed by you, was this evening protested for non-payment, and the holders look to you for the payment thereof.

Your obedient servant,

P. B. EATON, Notary Public."

It was proved, under objection by the defendant's counsel, that the above note was given in renewal for a balance of a previous note signed by S. Warden and endorsed by the defendants, due the 11th November, 1844; also that the note in question was the only note in the bank, made by S. Warden, and endorsed by the defendants.

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The above facts appearing, it was insisted on the part of the defendants, that they were not properly charged as endorsers, and the following grounds were urged: 1. The notice of protest was not upon the note in question, but was a notice of protest of a note for \$300. 2. The note in question is made payable to the order of the defendants jointly, and the notice of protest speaks only of an individual endorsement, and is addressed to the defendants severally. 3. The plaintiffs had no right to show that the defendants were not misled by the notice. 4. Even if the note had been correctly described in the notice, still such notice was defective in not stating that payment had been demanded and refused, and when the note was made, and when it became due and payable. MAYNARD, J. held that the notice was not sufficient to charge the defendants as endorsers, and that the plaintiffs could not recover. The plaintiffs excepted, and had a bill of exceptions duly signed and sealed, on which the supreme court sitting in the seventh district, gave judgment for the defendants.

John Porter, for the plaintiffs in error. The notice of protest served on the defendants was a sufficient notice to charge them as endorsers of the note in question; for it informed the defendants with all reasonable certainty, that this note for \$600 had not been paid by the maker, and that the same had been demanded at the time and place of payment, and payment refused. (*Reedy v. Seixas*, 2 John. Ca. 337; *Bank of Rochester v. Gould*, 9 Wend. 279; *Bank of Alexandria v. Swan*, 9 Peters, 33; *Mills v. Bank of the U. S.* 11 Wheat. 431; *Remer v. Downer*, 23 Wend. 620; *Kilgore v. Bulkley*, 14 Conn. 362; *Crocker v. Getchell*, 10 Shep. 392; *Story on Prom. Notes*, § 349, 354.)

As no particular form of a notice of protest is prescribed by law, the object being merely to inform the endorser of the demand, and non-payment by the maker, and that he is held liable for the payment of the note, if the amount had been omitted it would still have been sufficient to identify the note and

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charge the endorsers ; and therefore that portion of the notice may be rejected as superfluous. (*Reedy v. Seixas, supra.*)

It is not necessary to state in a notice of protest, either the date of the note, or the time when it became payable. In these respects the notice in this case is in the same form with that in general use by notaries, as is proved by the forms of notices given in decided cases. (*Remer v. Downer, 23 Wend. 620; Bank of Rochester v. Gould, 9 id. 279; Edmonds v. Cates, 2 Lond. Jur. 183; Gurgeon v. Smith, 2 Nev. & Perry, 303; Margeson v. Goble, 2 Chit. R. 364; Houlditch v. Cautty, 6 Scott, 209.*)

The statement in the notice served, that the note "was this evening protested for non-payment, and that the holders look to you for the payment thereof," and signed by a notary, is equivalent to saying that payment of the note had been demanded by him, and had been refused ; and necessarily implies that he had demanded payment of the note, according to its terms, and that payment had been refused. (*See cases last cited; Chit. on Bills, 10th Am. ed. 467, 8, 9, and notes; Mills v. Bank of U. S. 11 Wheat. 431; Story on Prom. Notes, §§ 350, 351, 352, 354.*)

The note is made payable to both the defendants, and is endorsed by them individually, and the notice correctly describes them as having endorsed individually ; the law only requiring that notice should be served upon both, as was done in this case. (*Sheperd v. Hawley, 1 Conn. 368; Willis v. Green, 5 Hill, 232; Story on Prom. Notes, § 308; Sayre v. Frick, 7 Watts & Serg. 383.*)

W. T. Worden, for the defendants in error, insisted that the notice of protest was not sufficient to charge the endorsers ; and cited *Remer v. Downer, (23 Wend. 620;)* *Ransom v. Mack, (2 Hill, 587;)* *Cayuga Co. Bank v. Dill, (5 id. 403;)* *Esdaile v. Sowerly, (11 East, 114;)* *Staples v. Okines, (1 Esp. R. 332;)* *Free v. Hawkins, (8 Taunt. 92;)* *Peeking v. Graham, (1 Cromp. & Mees. 725;)* *Clegg v. Cotton, (3 Bos & Pull. 239;)* *Predeaux v. Collier, (3 Starkie, 57;)* *Tindal.*

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v. Brown, (1 T. R. 167;) *Chit. on Bills*, 527; 8th Lond. ed., *Thompson on Bills*, 506; *Bank of Chenango v. Root*, (4 Cowen, 126;) *Boulton v. Welsh*, (3 Bing. N. Cases, 688; 4 id. 411;) *Messenger v. Southey*, (1 Man. & Granger, 76;) *Strange v. Price*, (10 Ad. & E. 125;) *Hartley v. Case*, (4 Barn. & Cress. 408) 7 Bing. Rep. 530, 533; 2 Hen. Black. 609; *Furze v. Sharwood*, (2 Ad. & Ellis, N. S. 388.)

JEWETT, Ch. J. There is no question but that due presentment for payment and notice of non-payment to the endorsers of a promissory note, are conditions precedent to the liability of the endorsers, and that the notice may be either written or verbal. (*Cuyler v. Stevens*, 4 Wend. 566.) Such presentment of the note in question was made and notice of non-payment in the form shown by the evidence given. The only material question then is, whether that notice is sufficient. It is well settled that there is no precise form of words necessary to be used in giving notice; it is sufficient, if the language used is such, as, in express terms or by necessary implication, to convey notice to the endorsers of the identity of the note, and that payment of it on due presentment has been neglected or refused by the maker.

The fact which was necessary to be established by the plaintiff is, that the defendants had due notice of the dishonor of the note in question. The notice, such as it is, was given at the precise time and place required by law. The evidence shows that this note was given for a balance due upon and in renewal of a former note payable at the same bank on the 11th of November, 1844, made by S. Warden and endorsed by the defendants, to whose order it was made payable. But it is contended that the notice merely informs the defendants of the non-payment of a note drawn and endorsed respectively by the defendants for \$300, and not of a note for \$600, endorsed by the defendants *jointly*. Concede that such variance or misdescription exists. It is well settled in accordance with good sense, that an immaterial variance in the notice will not vitiate it. The variance must be such as, that under the circumstances of the

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case, the notice conveys no sufficient knowledge to the endorsers of the identity of the particular note which has been dishonored. (*Mills v. The Bank of the U. S.* 11 Wheat. 431; *Bank of Alexandria v. Swann*, 9 Peters, 33.)

Now having the accessory facts, namely, that this was the only note in this bank drawn by S. Warden and endorsed by the defendants, and the intimation conveyed by the figures "\$600" upon the margin of the notice, who can doubt but that this notice conveyed to the minds of the defendants the information that this identical note had been dishonored, although it misdescribed the note as it respects the sum for which it was made in the body of it? The defendants knowing the facts stated, on the receipt of this notice could not, as it seems to me, fail to be apprized by it that this particular note had been dishonored. It was said on the argument, that the notice, to be effectual, must be perfect on its face, to carry the information to the endorser of the non-payment of the note, and that it could not be aided by accessory facts. The cases of *Shelton v. Braithwaite*, (7 Mees. & Welsb. 436,) and *Stockham v. Parr*, (11 *id.* 809,) are very much in point to show that a notice, defective on its face, may be aided by such facts, and that it is proper to consider them in deciding the question of the sufficiency of such notice.

It was also contended that the notice is fatally defective and insufficient to charge the defendants as endorsers of the note in question, on the ground that the notice describes the endorsement of the note as an *individual* and not a *joint* endorsement. The note is drawn payable "to the order of F. L. Griswold and E. A. Warden," and is endorsed by the payees respectively. In such case the law requires notice to be given to each of them, as notice to one will not, as it will in the case of partners, be deemed notice to the other. (*Willis v. Green*, 5 Hill, 232.)

The objection rests upon the ground of misdescription of the note in question; that the receipt of this notice did not and was not calculated to inform the defendants of the non-payment of this note; that to effect such object this notice should have described the note as having been endorsed by both defen-

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dants. It seems to me that to hold in conformity with this objection would be to sacrifice substance to the merest technical formality; and that it is quite impossible not to see that under the circumstances of this case the notice fully informed the defendants that this particular note had been dishonored.

Another objection to the notice is that it does not state that payment of this note was ever *demand*ed or that it was *refused*, nor *when* nor *where* such demand was made and payment refused. The notice is dated "Cayuga County Bank, Auburn, May 3, 1845," and states that S. Warden's note for \$300, payable at this bank, endorsed, &c. "was this evening protested for non-payment, and the holders look to you for the payment thereof."

The case of *Mills v. The Bank of U. S.* (11 *Wheat.* 431,) shows that it need not be stated in the notice that a *demand* of payment was made; that it is sufficient to state the fact of non-payment of the note, which the notice in this case alleges, as it states that the note was protested for non-payment. Whether the demand was duly and regularly made is matter of evidence to be given at the trial; and to the same effect is the case of *Stocken v. Collins*, (9 *Carr. & Payne*, 653.) I am of opinion that the notice under the circumstances of this case was sufficient, and that the court below erred in its judgment; that the judgment should be reversed with a *venire de novo* by that court, and that the costs should abide the event.

Judgment reversed.

CHRETIEN vs. DONEY and others.

A. executed to B. a lease of certain premises for one year, containing a clause in these words: "B. to have the privilege to have the premises for one year, one month and twenty days longer, but if he leaves he is to give four months notice before the expiration of this lease." *Held*, that the lease created a term for the full period of two years, one month and twenty days, defeasible at the election of the tenant, after one year, by giving notice of his intention to leave the premises, four months previous to the expiration of the year.

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Where the landlord obtains possession of the demised premises by summary proceedings which are reversed in the supreme court upon *certiorari*, that court should not award restitution to the tenant, if the term has expired before the judgment of reversal is rendered.

ON error from the supreme court. John Chretien, on the 11th day of March, 1846, instituted proceedings before a supreme court commissioner, under the statute authorizing summary proceedings to recover the possession of demised premises. In his affidavit, presented to the commissioner, he set forth a lease under seal, executed between himself and John Doney, dated the 5th of March, 1845, whereby he demised to said John Doney certain premises, known as the Farmers' Exchange, in the city of Buffalo, for one year from the 10th day of March then instant, at a rent of five hundred dollars; fifty dollars payable down, and the remainder in seven equal monthly instalments, the first to be paid on the 10th day of April then next. The lease contained a clause by which it was to become void in case the lessee should "demise or assign" the premises without the consent of the landlord. The last clause in the lease was in these words: "*The said Doney to have the privilege to have the premises for one year, one month and twenty days longer; but if he leaves he is to give four months' notice before the expiration of this lease.*" The affidavit further stated that Giroux and Wilson, or one of them; was in possession of the premises, holding the same as the assignees, lessees, or agents of said John Doney, to whom said Doney had sold or assigned his interest in said lease before the expiration of the term; that the said John Doney, as the deponent was informed and believed, lived at Rochester; that he had given no notice of his intention to hold the premises after the 10th of March, 1846; and that the said Doney, or the persons above named, held over and continued in possession of the premises, after the expiration of said lease, without the permission of the deponent, and against his will.

Upon this affidavit the commissioner, on the 4th of March, 1846, issued his summons directed to Giroux, Wilson, and Doney, and requiring them to remove from the premises, or show

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cause, on the same day at four o'clock. The summons was served at half past one o'clock, P. M., of the same day, personally on Wilson and Giroux, and on Doney by delivering a copy to Wilson, a person of mature age, residing on the premises, Doney being absent from the premises and in the city of Rochester, his last place of residence being, as the affidavit of service stated, on the premises. At the time mentioned in the summons, Giroux alone appeared before the commissioner, and made oath in writing that he was the agent of Doney, the lessee, and as such was in possession of the premises under the same lease set forth in the landlord's affidavit; that under the last clause in said lease, no notice was necessary unless the lessee concluded to surrender the premises; that the said "*Doney, or the persons named in the affidavit of John Chretien, are not holding over, and do not continue in possession after the expiration of the term, without permission;*" that said Doney was holding the premises under the lease and agreement aforesaid, and intended to hold for one year, one month and twenty days from the 10th day of March, 1846; and that on the 14th day of February, 1846, he gave notice of such intention to said Chretien.

Giroux also objected before the commissioner to any further proceedings in the matter, on the ground *that it did not appear by the affidavit of the landlord that either of the persons summoned held over after the expiration of the term granted by the lease.* The objection was overruled by the commissioner, who also decided that John Doney himself should have made the affidavit instead of Giroux, no reason being given why it was not made by Doney; and that, even if the affidavit was properly made by Giroux, it was not a sufficient denial of the facts upon which the summons was issued. The commissioner therefore immediately issued his warrant of removal in the usual form, under which the landlord was put in possession of the premises. The supreme court, on certiorari, reversed the proceedings, and awarded restitution. The judgment of reversal and restitution was rendered in December, 1847.

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R. Germain & N. Bennett, for the plaintiff in error.

J. B. Lathrop & H. Seymour, Jr. for the defendants in error.

RUGGLES, J. The lease from Chretien to Doney was a lease for one year, or for two years, one month and twenty days, at the option of Doney. Doney's election to give up the premises at the end of the first year, was to be signified by a notice of at least four months before the expiration of that year. If he failed to give that notice, the contract became a lease for the longer time. No new writing or agreement was contemplated between the parties. Although the amount of rent and the time or times of payment for the extended term, are not expressed, that omission is supplied by construction of law. The right to hold during the extended term is given to Doney in plain and express language, in the lease; and the legal inference is that he should pay rent at the same rate as for the shorter term, and at corresponding times. The rent, therefore, for the extended term was at the rate of \$500 a year—ten per cent. of which was payable at the commencement, and the residue in seven equal monthly instalments.

The affidavit of the landlord, on which the proceedings before the commissioner were founded, does not state that Doney gave the notice mentioned in the lease that he intended to leave the premises at the expiration of the first year; and this notice was necessary to put an end to the lease at that time. There is a provision in the lease that if Doney, the tenant, should assign his lease without the consent of the landlord, then the lease should determine and be void. And the landlord, in his affidavit, does say that Doney had sold or assigned his interest in the lease and premises before the expiration of the lease; but he does not say that he sold or assigned without the lessor's consent.

The landlord, in his affidavit, therefore, does not show that the tenant's term was at an end, either by lapse of time or otherwise, nor is there enough in the affidavit to show the tenant's possession unlawful. This objection to the sufficiency

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of the affidavit was made before the commissioner, and overruled. The commissioner erred, therefore, in proceeding to remove the tenant, and the supreme court was right in reversing his decision.

But when the judgment of the supreme court was rendered the extended term of the lease had expired, and Doney's right of possession had ceased. That part of the judgment of the supreme court which restores him to the possession of the premises, is therefore erroneous. It was probably entered by the attorney without being so ordered by the court. It stands on the record, however, and must be reversed.

But we are of opinion that under the 48th section of the statute under which this proceeding was had, (2 R. S. 516,) the supreme court had the power of giving costs on the reversal of the judgment of the commissioner, whether they awarded restitution or not. The judgment of the supreme court ought therefore to be affirmed in all respects except as to the award of restitution. That part of it should be reversed. The judgment being reversed in part and affirmed in part, neither party should recover against the other his costs on the writ of error in this court.

Ordered accordingly.

JEWETT, Ch. J., dissented.

THE MAYOR, &C. OF NEW-YORK, *appellants*, vs. SCHERMERHORN and others, *respondents*.

Where the decree or order appealed from was made before the 1st of July, 1848, when the code of procedure took effect, the right of appeal, the time within which it must be brought, and the form of bringing and prosecuting it, depend upon the law as it stood when the decision was made; but where the decision was after that day, whether in a suit pending on that day, or commenced subsequently, the right of appeal, the time within which it must be taken, and the mode of procedure, are regulated by the code.

An interlocutory order was made by the supreme court in equity, and notice thereof served 19th May, 1848. An appeal was taken July 24th, 1849; *held*, that such appeal, being barred by the lapse of fifteen days, according to the statute in force before the code of procedure took effect, was too late.

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An order of the supreme court at general term, denying an application for a rehearing, is interlocutory within the meaning of the statute requiring an appeal to be brought within fifteen days.

Mr. Taber, for the respondents, moved to dismiss two appeals. On the 1st of April, 1848, a decree in favor of Schermerhorn and others against the corporation was made by the supreme court in special term. The corporation applied to the court in general term for a rehearing; the motion was denied, and notice of the order denying the motion was served on the 19th of May. The corporation appealed from both orders to this court on the 24th of July.

Mr. Willard, for the appellants,

BRONSON, J. No appeal will lie to this court from an order or decree of the supreme court made at a special term. (*Gracie v. Freeland*, ante p. 228.) And that appeal must therefore be dismissed.

The order made at the general term denying the motion for a rehearing was not a final decree; and the appeal should therefore have been made within fifteen days after notice of the order. (2 R. S. 605, §§ 78, 79.) The time for appealing expired with the third day of June, and the appeal was not taken until the 24th day of July. It was then too late.

But we are referred to the code of procedure, which allows two years for taking an appeal; (§ 279;) and gives this court jurisdiction to review by appeal every determination "hereafter made." (§ 11.) And as the order in question was made on the 19th of May, *after* the code was passed, the appellants insist that they had two years from the date of the order to bring an appeal. Although the code was passed on the 12th of April, before the order was made, it did not take effect, excepting a few sections, until the first day of July following. (§ 391.) It did not begin to speak until that day; and that was *after* the order had been made, and after the time allowed for appealing, by the old law, had expired. The eleventh section says nothing about such a case; it only speaks of cases where the

determination was made on or after the first of July—the time when the code took effect.

Another argument remains to be noticed. The 279th section of the code, which gives two years for taking an appeal, only applied, as it was originally passed, to actions commenced after the code took effect. (§ 8.) The second section of the supplemental code applies the 279th section, among others, to future proceedings in civil suits pending when the code took effect; and when a judgment, decree or final order in such a suit has been made since that time, or shall be made hereafter, it may be reviewed in the cases, (§ 282,) within the time, (§ 279,) and in the mode, (§ 271,) prescribed by the code. But this suit was not pending on the first day of July, when the code took effect; it had been terminated by a final decree before that time; and there have been no proceedings in the suit since that time to be reviewed.

We are reminded by the counsel for the appellants, that the third subdivision of the second section of the supplemental code speaks of the 279th, and several other sections of the code, as applicable to the review of judgments, decrees and orders “from which no writ of error or appeal shall have been already taken;” and it is inferred from the words quoted that there may be an appeal under the code after the first of July, from a judgment, decree or order made before that time. But there is an incongruity between those words and the general clause of the section; they are irreconcilable, and one or the other must give way. The section took effect at the same time with the code. (*Supp. Code*, § 18.) The general clause of the section says that certain sections of the code shall apply to *future* proceedings, that is, proceedings *after* the first of July, in suits pending on that day; and it is absurd to speak of reviewing proceedings taken *after* the first of July, “from which no writ of error or appeal shall have been *already* taken;” that is, taken *before* the first of July. As the general clause applies to, and qualifies all of the subdivisions of the section, it is more important than the words quoted from the third subdivision; and those words must, I think, be rejected. After they are out, the whole pro

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vision will be congruous; and the third subdivision will still have effect, though its influence will not be so wide as that which the appellants seek to give to it.

On the construction which I have given to these statutes, when the matter was decided before the first of July, the right to a review, the time within which the proceeding must be commenced, and the form of prosecuting it, from beginning to end, all depend upon the old law. The code says nothing on the subject. But when the matter is decided after the first of July, whether the suit was commenced before or after that day, the right to appeal, the time within which the appeal must be taken, and the mode of procedure, all depend upon the code. A different construction might give an appeal after the first of July, in a case where the right of appeal had been lost by the lapse of time before the code took effect, which could not have been intended by the framers of the code.

The code has nothing to do with this case; and as the time for appealing had expired before the appeal was taken, I am of opinion that the motion should be granted.

Motion granted.

SPAULDING, appellant, vs. KINGSLAND and others, respondents.

An order was made by the chancellor on the 23d of June, 1848, denying a motion to vacate a decree and for leave to take proofs. An appeal was brought in the mode prescribed by the code of procedure, on the 11th of July, 1848; held, that such appeal should have been made in the form prescribed by the statute and rules in force before the code of procedure took effect.

Held further, that the code of procedure gives no new right of appeal from an order made before it took effect, and that the chancellor's order in question, being upon a matter addressed to his discretion, was not the subject of appeal, according to the previous rule in such cases.

S. Stevens & N. Hill, Jr. for the respondents, moved to dismiss the appeal. The chancellor, on the 23d of June last, denied the appellant's motion to vacate a decree which had been

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entered against him by default, and a further motion (if the first should be granted) to open the order closing the proofs. Notice of the order denying the motions was served on the 29th of June, and the appeal was taken on the 11th of July. The appeal was taken in the mode prescribed by the code of procedure, and not in accordance with the old law.

A. Taber, for the appellant.

BRONSON, J. The 271st section of the code of procedure, which abolishes the old, and gives a new mode of review, did not at the first apply to any adjudication in actions commenced before the first of July, when the code took effect. (§§ 8, 391.) But it was subsequently applied to proceedings after the first of July in suits which were pending before and on that day. (*Supp. Code*, § 2, 18.) The suit in which this order was made was not pending on the first day of July; it had been disposed of by a final decree before that time. And further, there has been no proceeding in the suit since the first of July: the order appealed from was made before that day. The appeal should have been in the form prescribed by the old law, the code having nothing to do with the case. (*Mayor of New-York v. Schermerhorn*, ante, p. 423.)

There is a further, and equally fatal objection, that the order was not one from which an appeal would lie. It was a question of practice addressed to the discretion of the chancellor. (*Fort v. Bard*, ante, p. 43.) The right to appeal, as well as the mode of proceeding, depended on the old law.

Appeal dismissed.

Butler v. Miller.

BUTLER and VOSBURGH vs. MILLER.

When an appeal under the judiciary act of December, 1847, (*Stat.* 1847, p. 639,) was brought prior to the 1st day of July, 1848, from a decision of the supreme court granting a new trial on a bill of exceptions; *held*, that the jurisdiction of the court to hear and determine such appeal was not taken away by the code of procedure. Whether appeals may still be brought from the decisions of the supreme court on bills of exceptions in cases where the action was pending prior to the first day of July, 1848, *quere*.

It seems, that the code does not take away a right of appeal which had attached before it went into operation.

APPEAL by the plaintiffs, under the fifth section of the judiciary act of December, 1847, (*Stat.* 1847, p. 639,) from a decision of the supreme court granting a new trial to the defendant upon a bill of exceptions. The appeal was taken prior to the first day of July last, when the code of procedure took effect. (*Stat.* 1848, p. 497.)

K. Miller, for the defendant, said the court could not hear the appeal, as the provisions of the judiciary act on this subject were repealed by the 388th section of the code. He cited also §§ 271, 282, 11.

John H. Reynolds, for the plaintiffs, cited § 10 of the code.

BRONSON, J. The code of procedure specifies the cases in which there may be an appeal to this court, without including the appeal on a bill of exceptions provided for by the judiciary act of December, 1847, (§§ 282, 11,) and abolishes writs of error and appeals as they have heretofore existed. (§ 271.) And further, all statutory provisions inconsistent with the code are repealed. (§ 388.) But originally these sections only applied to actions commenced on or after the first day of July last; (§§ 8, 391, 10;) and the supplemental code has only applied sections 271 and 282 to future proceedings in suits pending on that day. (§ 2.) This appeal was taken prior to the first day of July last, and

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we still have jurisdiction to hear it. (*Code*, § 10.) The act of December, 1847, when applied to appeals depending on the first of July, is not so inconsistent with any thing in the code as to come within the repealing section. (388.) The code-makers did not intend to take away any right which had already attached under the old law ; but only to change the law for the future.

Whether appeals may still be brought from the decisions of the supreme court on bills of exceptions, in cases where the action was pending prior to the first day of July, is a question which need not now be decided.

We are of opinion that this appeal, and the others which have been mentioned as depending on the same question, may be prosecuted in the same manner as though the code had not been passed.

Ordered accordingly.

BROWN vs. FARGO.

The judiciary act of December, 1847, (*Stat. of 1847*, p. 639,) authorizing appeal from decisions of the supreme court on bills of exceptions, applies only to cases where the supreme court grants or refuses a new trial before any judgment in the cause ; and not to cases where that court reverses or affirms the judgment of a subordinate court.

J. K. Porter moved to dismiss the appeal. In May, 1848, the supreme court, on writ of error, reversed the judgment of the Chenango common pleas, and ordered a *venire de novo* to issue. From that decision the defendant in error appealed to this court before the first of July, 1848, under the judiciary act of December, 1847.

N. Hill, Jr. for the respondent.

PER CURIAM. The statute under which this appeal is brought does not authorize an appeal in such a case. The remedy was by writ of error.

Motion granted.



CASES

ARGUED AND DETERMINED

IN THE

COURT OF APPEALS

1 433
113 462

OF THE

STATE OF NEW-YORK,

IN NOVEMBER TERM, 1848.

**THE FARMERS' LOAN AND TRUST COMPANY, *appellants*, vs.
HIRAM WALWORTH, clerk in chancery, *respondent*.**

Where moneys deposited in the court of chancery, in a suit for the partition of lands, have been invested by the clerk upon bond and mortgage executed to him in his official character, such clerk has no power to discharge the mortgage without the order of the court.

And it seems, that where the clerk executes such a discharge without actual payment, and without the order of the court, it is void even as against *bona fide* purchasers of the property encumbered by the mortgage.

But the unauthorized act of the clerk, in executing such discharge, may be ratified by the owners of the fund secured by the mortgage.

A ratification of part of an unauthorized transaction of an agent, or one who assumes to act as such, is a confirmation of the whole.

One of the clerks in chancery loaned upon bond and mortgage the sum of \$29,000, which had been paid into that court to secure a widow's dower, in pursuance of a decree in partition. Afterwards, the borrowers executed to the clerk another bond for the same sum, and another mortgage upon *different* property. These securities were intended as a substitute for the first bond and mortgage, and were so received by the clerk, who, thereupon, without any direction of the court, executed a satisfaction of the first mortgage, which was entered of record. The owners of the fund, (after the death of the widow,) with notice of all the circumstances,

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foreclosed the second mortgage, in the name of the clerk, and had the property sold *Held*, that although the discharge of the first mortgage was void, and might have been treated as a nullity, yet the election of the owners of the fund to proceed upon the substituted security, was a ratification of the acts of the clerk, and therefore, that a bill filed to foreclose the first mortgage, for the purpose of collecting the residue of the money not realized by the first foreclosure, could not be sustained.

It seems, that if the owners of the fund had elected to proceed upon the first mortgage, the appellants, who were *bona fide* purchasers of the property covered thereby, would have been entitled to the second mortgage for their indemnity.

The act of a public officer exceeding the authority conferred on him by law may be adopted by the party for whose benefit it is done. *Per* BRONSON, J.

The equitable doctrine in regard to marshalling securities is applicable only where one party has a lien upon or interest in two funds, with a right to resort to either or both, and another party has a lien upon or interest in only one of those funds.

Per GARDINER, J.

APPEAL from chancery. The bill in this cause was filed against Samuel Jones, John L. Graham, and The Farmers' Loan and Trust Company, to foreclose a mortgage bearing date the 4th day of April, 1835, executed by Jones and Graham to John Walworth, as clerk in chancery for the first circuit. The Farmers' Loan and Trust Company defended the bill, and the case, upon pleadings and proofs, was in substance as follows.

On the said 4th day of April, 1835, John Walworth, as such clerk, loaned to Jones and Graham the sum of \$29,000, payable on the 4th of April, 1838, with annual interest; to secure which they executed their bond and the mortgage in question, covering eighty-eight lots in the twelfth ward of the city of New-York. The money so loaned had been previously paid into the court of chancery, in pursuance of a decree of that court made in a suit for the partition of the real estate of Henry A. Coster, deceased; the widow of said Coster (Mrs. Hosack) being entitled to the interest during her life, as a part of her dower, and his heirs and their assigns being entitled to the money, after her decease. She died in July, 1841, and this suit was instituted by the persons who became the owners of the fund upon her decease, under the direction of the court of

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chancery, in the name of Hiram Walworth, the successor in office of John Walworth.

On the 31st day of December, 1836, Jones and Graham, the mortgagors, conveyed the premises covered by the mortgage, and other lands, to The Farmers' Loan and Trust Company, for the consideration of \$200,000, payable in certain certificates to be issued by that company, of which \$125,000 was paid at the time, and \$75,000 was to be retained until Jones and Graham should pay off and discharge the mortgage above mentioned, and such other liens as encumbered the premises conveyed. This conveyance was recorded April 6, 1837. On the 12th day of April, 1837, Jones and Graham executed to the said clerk a new bond for the same sum of \$29,000, and a new mortgage upon other real estate situated in a different part of the city. These were intended as a substitute for the previous bond and mortgage, and were so accepted by the clerk, who thereupon executed a satisfaction of the first mortgage, which was duly entered of record. A certificate of such satisfaction was exhibited to The Farmers' Loan and Trust Company, and the company afterwards issued to Jones and Graham certificates for the remaining sum of \$75,000. The last mortgage was substituted for the first, and the first one satisfied by the clerk, without the direction or authority of the court of chancery; but these acts were done in good faith, and with no improper design on the part of any of those concerned in them. The unencumbered property included in the last mortgage was estimated, by competent appraisers to be of sufficient value to render the debt amply secure; and the evidence tended to show that, at the sale thereof in 1842, (hereafter mentioned,) it produced as large a sum as the property embraced in the first mortgage could have been sold for. The property embraced in both mortgages had then greatly depreciated since the mortgages were respectively executed.

On the 2d of May, 1842, (Mrs. Hosack having died,) the complainants in interest in the present suit, the owners of the fund loaned to Jones and Graham, filed their bill in the name of the clerk to foreclose the last mortgage, and on the 5th of October,

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1842, obtained the usual decree of foreclosure, and for the sale of the premises. The Farmers' Loan and Trust Company were not made parties to that foreclosure. Under that decree the premises covered by the last mortgage were sold for the sum of \$21,960, on the 7th day of November, 1842, leaving a deficiency of \$15,578,49, which amount still remains due; and for the purpose of making that sum, the present suit was instituted to foreclose the first mortgage.

At the time the previous suit was instituted to foreclose the last mortgage, it was known to the solicitor of the complainants in interest therein, that the last mortgage had been substituted for the first, and that the first one had been discharged by the clerk; but it being also known to him that the clerk had executed the discharge without actual payment, and without the direction of the court, it was his intention to fall back upon the first mortgage, in case the foreclosure of the last did not produce enough to satisfy the debt. Jones and Graham, the mortgagors, were in affluent circumstances when the mortgages were respectively executed, but at the time of the foreclosure suit upon the last mortgage, they had become insolvent, and that fact was also known to the solicitor. The same solicitor also testified in the present suit, that from the fact of the insolvency of the mortgagors, he took it for granted at the time he instituted the suit to foreclose the last mortgage, that they had parted with the property included in the first mortgage, but who had acquired the title to the same, he had never inquired.

The assistant vice chancellor of the first circuit made a decree, declaring that the discharge executed by the clerk, of the first mortgage, was void, that such mortgage was still in force, and granting the prayer of the bill for foreclosure and a sale of the premises. The Farmers' Loan and Trust Company appealed to the chancellor, and the cause then became vested in the supreme court organized under the new constitution, where the decree was affirmed. The Farmers' Loan and Trust Company appealed to this court.

The Farmers' Loan and Trust Co. v. Walworth.

Wm. Curtis Noyes, for the appellants. I. The clerk in chancery was the trustee or agent appointed by statute to invest, manage, control and collect the fund loaned to Jones and Graham upon their bond and mortgage of April 4th, 1835. (2 R. S. 169, §§ 8, 9; 1 *id.* 119, § 24, *sub.* 4; 2 *id.* 170, § 11; *id.* 171, §§ 18, 21, 22; *id.* 172, §§ 24, 25.) And having authority to receive payment, he had, as a necessary consequence, power to acknowledge satisfaction.

II. The 70th section of the act concerning the partition of lands, (2 R. S. 328, § 70,) does not apply to the partition of lands in the court of chancery, for although a like power is conferred upon that court, yet the 80th section does not declare all the provisions of the act applicable to that court, and the language of the 70th section does not, in terms, embrace the register in chancery. Besides, the statute was not necessary to confer jurisdiction, in partition, upon the court of chancery. This has been for a long period an acknowledged head of equity jurisdiction, independent of any statute. (*Allnat on Partition*, 77, 83.)

III. In any event, the only defect in the discharge of the mortgage, was the want of the order of the court authorizing it. And on this point it is submitted on behalf of the appellants, that there was nothing, either in the law or the facts of the case, to charge them with notice of the omission. On the contrary, they acted with entire good faith, relying upon the accuracy and integrity of a public officer; and they had a right to believe, as they undoubtedly did believe, that the clerk had authority to perform the act upon which they relied; and having advanced a valuable consideration, they are purchasers in good faith, and as such are entitled to protection. (1 *Story's Eq.* § 376; 1 *Y. & Coll.* 328; 1 *Story's Eq.* § 400, *a*; 1 *Hare's Rep.* 43; *S. C.* 1 *Phil.* 244; *Frazer v. Western*, 1 *Barb. Ch. Rep.* 220.)

IV. The second mortgage of Jones and Graham was taken by the clerk as a substitute for the first mortgage, and the parties in interest having, with a knowledge of all the circumstances, foreclosed and received the avails of the second mortgage,

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they have thereby ratified and confirmed the act of the clerk in taking the substituted security, and are bound by it, with the same effect as though they had originally authorized it. And having thus ratified and adopted the act of their agent and trustee in part, they are not at liberty to reject another part of the act performed by him, although it may have been to their prejudice. (*Liv. on Agency*, 44, 394, 396; *Story on Agency*, §§ 244, 250, 253; *Frothingham v. Haley*, 3 Mass. 70; *Wilson v. Timmin*, 6 Man. & Gr. 236; *Foster v. Bates*, 7 Lon. Jur. 1093; *Codwise v. Hacker*, 1 Caines, 527; *Cairnes v. Bleecker*, 12 John. R. 300; *Vianna v. Barclay*, 3 Cowen, 281; *Bell v. Cunningham*, 3 Pet. R. 81; 1 Am. Lead. Cas. 421; *West Boynton Man. Co. v. Searle*, 15 Pick. 225; *Gaines v. Acre, Minor's (Ala.)* R. 141; *Hampshire v. Franklin*, 16 Mass. 76; *Zino v. Williams*, 9 Lou. R. 58; *Planters' Bank v. Sharp*, 4 Smedes & Marsh. 75; *Church v. Sterling*, 16 Conn. R. 389; *Burrill v. The Nahant Bank*, 2 Metc. 163; *Lawrence v. Taylor*, 5 Hill, 107.) This adoption amounts to an *estoppel*. (*Amer. Lead. Cases*, 420; *Blair v. Pathkiller's Lessee*, 2 Yerg. 407; *Ruggles v. Washington Co.* 3 Miss. R. 495; *Daggett v. Emerson*, 3 Story's R. 700; *Slate v. Perry*, *Wright's Ohio* R. 662; *Rogers v. Kneeland*, 13 Wend. 114; *Viggers v. Pike*, 8 Clark & Fin. 526.) And the adoption extends to the *entire act* of the agent or person professing to act as such. (*Amer. Lead. Cases*, 421; *Story on Agency*, §§ 250, 244; *Cushman v. Loker*, 2 Mass. R. 106; *Wilson v. Poultter*, 2 Strange, 859; *Newell v. Hurlbut*, 2 Verm. R. 351.) This view of the case is also sustained by the analogy of the law in relation to *infants*. (2 *Greenl. Ev.* 2d ed. § 367; *Goodsell v. Myers*, 3 Wend. 479; *Boston Bank v. Chamberlain*, 15 Mass. 220; *Lawson v. Lovejoy*, 8 *Greenl. R.* 405; *Delano v. Blake*, 11 Wend. R. 85; *Hillyer v. Bennett*, 3 *Edw. Ch. R.* 222; *Fontelet v. Murrill*, 9 Lou. R. 305; *Lowery v. Blake*, 1 *Dana's R.* 46.) So by the law in relation to the unauthorized acts of trustees. (2 *Story's Eq.* §§ 12, 62; *Murray v. Ballou*, 1 *John. Ch. R.* 581; *Murray v. Lylburn*, 2 *id.* 441; *Hill on Trustees*, 525, 338.) So upon the doctrine of election as appli-

cable to all the classes above enumerated. (*Bac. Abr. tit. Election*; *Co. Lit.* 146; *Lawrence v. Ocean Ins. Co.* 11 *John.* 241; 2 *Story's Eq.* § 1075.)

V. The doctrine in regard to marshalling assets has nothing to do with this case. That doctrine is only applied in cases where a party has a lien upon, or an interest in, two or more funds for a debt, and another party has a lien upon, or an interest in, only one of the same funds for another debt. In this case the clerk had but one fund, viz: one of the bonds and mortgages, as a security for the \$29,000, inasmuch as the condition of giving the last was, that the first should be satisfied. They never existed together. To hold that they did exist together, would be in direct contravention of the agreement upon which the last bond and mortgage were given, and would be a fraud upon the appellants, the grantees of Jones and Graham. (1 *Story's Eq.* § 633; *Chit. on Cont. Springf. ed.* 1842, p. 622, 783; *Domat, B. 1, tit. 1, § 1, sub. 5*; *id.* § 3, *sub. 1*; 1 *Evans' Pothier*, p. 22.)

Wm. M. Evarts, for the respondent. I. The validity of the mortgage was not discharged or impaired in any manner by the act of John Walworth, in executing and delivering the paper purporting to be a certificate of the payment of said mortgage. (1.) No clerk of the court of chancery, *virtute officii*, or by statute, had power of his own motion, to discharge, vary or impair the securities for moneys remaining in such court, or in any manner to deal with such securities or moneys, except under the direction of the court itself. (2 *R. S.* 169, 170, 171; *Chan. Rules*, 127, 128, 180.) (2.) The provisions of the statute respecting suits in partition confer but very limited powers, and impose very limited duties upon clerks of courts into which moneys or securities under proceedings in such suits may be brought, in respect of such moneys or securities. These provisions clearly exclude any inference of such authority to the clerk as was exercised in this case. (2 *R. S.* 325, 329, §§ 50, 54, 66, 68, 69.) (3.) The statute respecting suits in partition, distinctly provides in respect of investments of moneys brought

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into court in such suits, that "no such security, bond, mortgage, or other evidence of such investment shall be discharged, transferred or impaired, by any act of the clerk, without the order of the court, entered in the minutes thereof." (2 R. S. 328, § 70.) This section of the statute is not merely prohibitory of certain acts of the clerk, but renders them, if committed or attempted, entirely inoperative upon the security, which survives unaffected by such acts. But if the provisions of the statute are merely prohibitory on the clerk, then his acts in contravention of its absolute terms are equally void. (*Hallett v. Novien*, 14 John. R. 273, 290; *Illinois v. Delafield*, 8 Paige, 527; *Rex v. Justices, &c. 7 Barn. & Cress. 12*; *Jackson v. Andrews*, 7 Wend. 152.)

II. The defendants, Jones and Graham, could not oppose any equity to the foreclosure of the mortgage in suit, nor insist upon the validity of the pretended satisfaction piece. They were active parties to the illegal acts of the clerk, and besides, being personally bound for the debt, were indifferent as to what property it is satisfied out of.

III. The defendants, The Farmers' Loan and Trust Company, stand in no better condition in respect of the complainants' equity, than Messrs. Jones and Graham. (1.) They are subsequent mortgagees with actual notice of this mortgage, and an express acknowledgment of its superior lien. (2.) The first parcel of their bonds was advanced to Jones and Graham, in reliance upon the covenant of the latter, that out of them or their proceeds, they, (Jones and Graham,) would pay off this and other incumbrances. The second parcel was advanced upon the representation of Jones and Graham, that they had done so. For this breach of covenant and false representation, they are confined to a personal remedy against Jones and Graham. (3.) The Farmers' Loan and Trust Company were affected with notice of the peculiar character of this security, and if they have acted upon insufficient evidence of its payment or satisfaction, they must bear the consequences of their own error. (*Sugd. on Vend. ch. 17*; 1 *Story's Eq. §§ 399, 400*; *Jackson v. Cadwell*, 1 Cowen, 622; *Harrison v. Fly*, 7 Paige, 421; *Grif-*

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feth v. Griffeth, 9 *id.* 317; *Greene v. Sluyter*, 4 *John. Ch. R.* 46; *Pitney v. Leonard*, 1 *Paige*, 461; 5 *Price*, 306; 7 *Conn.* 333.)

IV. The parties in interest, the owners of the money in court in the partition suit, (the actual complainants in this suit,) had not in any manner waived or impaired their right to enforce the mortgage foreclosed in this suit. (1.) John Walworth never acted by any agency or authority derived from them, and they are not bound by his acts, admissions or acquiescence. He never was their trustee, and never had the legal title or possession of the fund in himself. (2.) Since (by permission of the court) they have resumed the control of their property which had been confided to the court of chancery, they have sought to realize the same from the securities which were delivered to them by the court as the representatives of their fund, in the order which the settled doctrines of this court sanction. (1 *Story's Eq.* §§ 633, 637, and notes, § 499.) (3.) The second mortgage, an undoubted security as against Jones and Graham, was on property in which no other parties were interested, and this they first exhausted, and have thereby relieved the property on which The Farmers' Loan and Trust Company had a subsequent lien, from their own prior lien, to the extent of the value of their second security. And the master's sale is conclusive of the value of that security.

V. The case at bar is *sui generis*, and the analogies claimed by the appellants' counsel have no application. (1.) No case for *election*, nor any juncture for entire repudiation or entire ratification, was ever presented to the parties in interest. They never had an opportunity of free choice, or of full repudiation. (2.) The relations of the parties in interest to John Walworth and his acts, are not even illustrated, much less governed, by those of principal and agent, infant and adult, trustee and *cestui que trust*.

VI. The doctrines of election, in the limited extent they are recognized at law, and in their full and complete administration in equity, widely differ. At law, from the imperfection of its processes, they result in estoppel and forfeiture, proceeding upon technical and logical grounds only. In equity they pro-

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ceed upon grounds of morality and conscience, to further and sustain in just proportion the conflicting interests of all parties. This case is governed by the latter.

VII. The parties in interest should be held to have made no election or ratification more unfavorable to themselves than the court would have obliged them to make, had the facts within the cognizance of the parties been spread before the court. 1. The court never would have *compelled* them to elect at their peril, between the second and inferior security, and the first security involved at least in litigation, and *prima facie* absolutely nullified. 2. The court never would have *permitted* them to elect to take only the first security, if by such election the second would have become void, and thus the burden of their whole claim thrown upon the property in which innocent third persons had acquired rights. 3. The operation of law upon the facts, was, that the first mortgage was not *satisfied*; that the second mortgage was not a *payment* as against us; but that as regards Jones and Graham and these appellants, it was a payment to its value in money and should be so upheld. In equity, Walworth, (or the parties in interest, and in this connection it is immaterial which,) became affected with a trust to realize the second security, and sustain it as a payment to its value on the first security, in furtherance of the intent of Jones and Graham, and in protection of these appellants, as far as the law would respect that intent, or could afford that protection. This has been done. 4. No party can complain of this treatment of the second security, unless prejudiced by it. No party has been prejudiced by it, and these appellants have been benefited to the extent of \$20,000.

VIII. The equitable doctrines of election and of marshalling securities afford the nearest analogies and the best guides for the judicial interpretation of our acts in respect of the two securities, and the court is referred for a full discussion and examination of them, and for collected authorities to 1 *Story's Eq.* §§ 633 to 637, and notes; also, § 499 and note; 2 *id.* §§ 1075 to 1098 and notes; *Dunlap's Paley on Agency*, 173, 324; 10 *East*, 378; 3 *Pick.* 495, 505.

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BRONSON, J. We are, I believe, all agreed, that the clerk had no authority, without an order of the court of chancery, to take a new mortgage as a substitute for the first, and discharge the first; and that the persons interested in that mortgage had the right to treat it as a valid and subsisting security, notwithstanding the satisfaction which had been entered of record. And this right might be exercised not only against the mortgagors, but against the Loan and Trust Company, although the company had advanced its funds on the faith of the supposed satisfaction.

This brings us to the question whether the owners of the first mortgage have done any act by which they have lost the right of resorting to that security.

The first or original mortgage was given to secure the payment of a loan, made by the clerk, of moneys which had been paid into court on account of the dower of Mrs. Hosack in certain lands which had been sold in a partition suit. The mortgage was made payable to the clerk, as is usual in such cases; but it was given and received for the benefit of Mrs. Hosack and the persons who would be entitled to the fund on her death. The clerk acted under an authority conferred by law; but the act was done for the owners of the fund, and they were the persons beneficially interested in the mortgage. If the security had failed, the loss would have fallen on them.

The second mortgage was upon other property. It was not an additional, but a substituted security: it was to take the place of the first mortgage, which was to be thereby satisfied, and satisfaction was to be, and was in fact entered of record. Such was the arrangement between the clerk and the mortgagors. It was no part of their purpose to do a wrong to the owners of the fund: the lands covered by the second mortgage were deemed an ample security for the debt; and the only object of Jones and Graham in procuring the substitution of securities was, the better to enable them to complete a pending negotiation with the Loan and Trust Company for a loan of two hundred thousand dollars. The lots covered by the original mortgage were included, with others, in a conveyance which Jones and

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Graham made to the company; and after satisfaction of the original mortgage had been entered of record, and in the belief that it had been legally done, the company lent funds to Jones and Graham to an amount greatly exceeding the amount of the mortgage.

Although the clerk in consenting to the substitution of securities made a mistake and exceeded his authority, he was nevertheless acting for the owners of the fund, and not for himself. It was an act which the fund owners might adopt, and which, when ratified, would completely legalize the substitution of the second mortgage for the first. The first would thereupon be satisfied in law, as well as in form, and the owners of the fund would have the beneficial interest in the new security. But it is said, that when an officer acts under an authority conferred upon him by law, the act cannot be ratified by the person for whose benefit it was done; and we are referred to the case of *Wilson v. Tumman*, (6 *Man. & Gran.* 236,) in support of that doctrine. The case proves no such thing. The point decided was, that when an officer, under process against A., seizes the goods of B., without any direction or authority from the creditor, the subsequent assent of the creditor to what has been done, without any act on his part, will not charge him with the trespass which was committed by the officer. But although mere assent would not make him a trespasser, his acts might have that effect. Indeed, it was admitted by Baron Parke on the trial of the cause, that the attorney of the creditor, who was also a defendant, would have been liable for the trespass, if the goods had been detained under an authority which he gave for that purpose subsequent to the seizure. And besides; although the creditor was not answerable to the owner of the property for the trespass, that does not prove that the act of the officer was in its nature incapable of ratification, so that nothing could be done to give it effect as between the creditor and the officer. It is undoubtedly a general rule, as was said in that case, that a man cannot adopt an act which was neither done for him, nor in his name. (See *Saunderson v. White*, 5 *B. & C.* 909; *Vere v. Ashby*, 10 *id.* 288.) But when an officer executes process in favor of a

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creditor, although his authority is conferred by law, he acts for, and is the agent of the creditor in such a sense that the act is capable of ratification. I have met with no case which holds a different doctrine. In *Armstrong v. Garrow*, (6 Cowen, 465,) the defendant, as sheriff, had arrested one Mumford on a *ca. sa.* in favor of the plaintiff, and on receiving the promissory note of a third person for the amount of the debt, had discharged Mumford out of custody. The sheriff had done an illegal act: the note was void in his hands, and he was liable to answer the plaintiff for the escape. Still the plaintiff was willing to accept the note, and demanded it of the sheriff, who refused to give it up. The plaintiff thereupon sued the sheriff for money had and received to his use, and recovered. The sheriff insisted that he could only be made liable in an action for the escape. But the court held, that the plaintiff might affirm the act of the sheriff, consider the execution paid, and call on him for the money. It was further held, that had the note been delivered to the plaintiff, the ratification would have made it a valid security in his hands. And from the note of the learned reporter it seems also to have been considered, that after the plaintiff had recovered against the sheriff on the ground that his act in taking the note had been affirmed, the note would have been valid in the hands of the sheriff. This rests on the principle, that a subsequent ratification is equivalent to an original authority. In *Pilkington v. Green*, (2 B. & P. 151,) the officer arrested Green on process in the nature of a *ca. sa.* issued by the commissioners of excise, and discharged Green out of custody on receiving promissory notes for the amount of the debt. The commissioners afterwards sanctioned what had been done; and on that ground the notes were held to be valid in the hands of the officer. The case of *Sugars v. Brinkworth*, (4 Camp. 46,) affirms the same principle. (See also *Corning v. Sutherland*, 3 Hill, 552.) There are undoubtedly many other cases which have gone upon the ground that an act done under an authority conferred by law might be adopted by the person for whose benefit it was done. Indeed, I doubt whether the principle has ever before been questioned; and I

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think it quite safe to conclude, that the acts of the clerk in relation to the two mortgages in question were of such a nature that they might be ratified by the persons interested in the fund

If the act of the clerk was of such a nature that it might be adopted and made their own by the persons interested in the fund, it is a point almost too plain for discussion that it was in fact ratified. Let us see what was done. In 1842, Mrs. Hosack having previously died, the owners of the fund were desirous of taking the money out of court, and for that purpose propose to call in the loan which had been made to Jones and Graham. They learned from the clerk and the public records every thing which was necessary to enable them to act with a just regard to their own interest. They knew that the first mortgage had been discharged, and that the second had been taken as a substitute for it. They knew also that Jones and Graham had become insolvent; and from that fact they inferred, as well they might, that Jones and Graham had parted with the property covered by the first mortgage to some one; and if they had looked at the public records, they would have found the conveyance to the Loan and Trust Company. There was clearly enough to put them upon inquiry, and they were, I think, chargeable with notice of that conveyance. It is enough, however, for the present, to say, that they had actual knowledge of every thing which had taken place between the clerk and Jones and Graham; and that they had good reason to believe, and did in fact believe, that some third party then owned the lands which were covered by the first mortgage. They knew, or were bound to know, that they had not a shadow of title to both of the mortgages: that if they asserted their right to the first, they could have no right to the second; and if they took the second, they could have no further claim upon the first. The alternative was thus fairly presented, whether they would disaffirm the act of the clerk, and take the first mortgage; or whether they would adopt his act, and take the second. They elected to take the second mortgage; and did take and foreclose it, and put in their pockets the money produced by the sale of the property. They had no color of title

to that mortgage, except upon the ground of adopting the act of the clerk in taking it; and it can hardly be doubted that there was a complete ratification.

It is true that the owners of the fund had the secret intention of falling back upon the first mortgage, if the foreclosure of the second should not produce enough to pay the debt. They intended to adopt the act of the clerk so far as it was beneficial to themselves, and to reject the residue. That, the law would not permit them to do. They had no choice but to take the whole, or none; and when they confirmed the agency in part, they ratified the whole transaction. By foreclosing the second mortgage, they confirmed the discharge of the first. This principle is so just in itself, and is so firmly settled, that I need do no more than refer to one or two books where many of the authorities are collected. (*Story, Agency*, § 250; *Paley, Agency*, 172, *Dunlap's ed.*) It would be strange indeed if the law would permit them to have the second mortgage, to which they have no title whatever except by affirming the act of the clerk, and yet allow them to reject that part of his act which induced the giving of that mortgage.

As the owners of the fund have, with their eyes open, agreed to the satisfaction of the mortgage which they are now attempting to foreclose, it cannot be very important to inquire whether they acted wisely or not, or whether they will be gainers or losers by the decision which they made. Nor is it important to know whether the Trust Company is better or worse off than it would have been had the owners of the fund disaffirmed the agency, and foreclosed the first mortgage. But as the owners of the fund think it hard that they should be held to the election which they made, I will briefly inquire how the case would stand without any special regard to the doctrine of ratification.

And in the first place, the owners of the fund had no right to both mortgages. Although Jones and Graham were bound to pay the debt, they were under no obligation to give additional security for the payment; and they never gave any. They executed a new security as a substitute for the first, and on the condition that the first should be discharged. The owners

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of the fund had no right to the new security, except upon the terms on which it was made and offered to them. If they took it, they, by that act, plainly consented to the discharge of the first mortgage. If, on the other hand, they determined to keep the first security, they could have no title to the second, because they would not assent to the terms on which it was offered to them. I am not aware of any rule, either of law or of equity, which will permit a creditor to accept a pledge or other security for his debt, and yet repudiate the condition on which the security was given. Debtors have rights as well as creditors. The case is still stronger in favor of the Trust Company, who are bona fide purchasers from Jones and Graham. Clearly the owners of the fund had no title to both mortgages; and yet the decree which has been made goes upon the ground that they have such a right, and that, after having foreclosed one mortgage, they may resort to the other. It is impossible, I think, that such a decree can stand.

But it is said, that had there been an attempt to foreclose the first mortgage, the Trust Company would have insisted, and equity would have decreed, that the owners of the fund should first exhaust their remedy under the second mortgage, and thusonerate, in whole or in part, the lands which the company had purchased from Jones and Graham: that by resorting to the second mortgage in the first instance, the owners of the fund have done no more than equity would have compelled them to do, and that the company can sustain no damage. This argument is open to several objections. In the first place, it assumes that the owners of the fund had two securities, and a right to resort to both of them, when such is not the fact. They had title to only one security, with an election between two as to which they would take. In the next place, the argument assumes that the company would have insisted that the second mortgage should be first foreclosed, when there is nothing to show that they would have made any such claim. I think the company would have reasoned differently, and said, "We cannot prevent the foreclosure of the first mortgage, and will not attempt it: if we are thus deprived of the property

which we purchased from Jones and Graham on the faith that the first mortgage was satisfied, we shall have a clear equitable claim to the use of the second mortgage for our indemnity, and equity will decree us such right: that will be just as between us and Jones and Graham; it will leave to the owners of the fund all the security which they ever had a right to claim; and no wrong will be done to any one." Thus they might, and undoubtedly would have reasoned, if they had followed their own interest. There is no foundation, therefore, for the argument, that the owners of the fund have done only what equity would have compelled them to do had they resorted to the original mortgage in the first instance. The company would not have asked such a decree; or at any rate, no one can undertake to affirm that they would have done it. If the owners of the fund had wished to know what the company would say on a bill filed to foreclose the original mortgage in the first instance, they should have filed such a bill, and made the company a party, and thus allowed them to answer for themselves. As that was not done, the owners of the fund can have no right now to guess what the company would have done under such circumstances, and build up a claim upon that foundation.

And finally, the course which the owners of the fund have pursued, and are now pursuing, will give them more than their just rights, and will do it at the expense of the Trust Company. The sale on the foreclosure of the second mortgage took place in October, 1842. Had the first mortgage, instead of the second, been foreclosed at that time, I do not understand from any of the witnesses that the property would have brought enough to pay the debt. The assistant vice chancellor states the effect of the evidence to be, that on a sale in the fall of '42, the lands included in the first mortgage would not have brought any more than was realized from the sale under the second mortgage. Assuming that the lands conveyed by the two mortgages would at that time have sold for equal sums of money, let us see how the case stands. The owners of the fund have got already—not the whole debt—but all that they ever had a right to claim beyond the personal obligation of the mortgagors

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They have had their election between the two mortgages; and as it turns out, the choice was not a bad one; for they have got as much by taking the second as they would have obtained by taking the first. And further, had they elected to take the first mortgage, they would have got no more than they have got now; and they would then have had no color of title to the second mortgage. The Trust Company would in that case have had a plain equity to use that mortgage for their benefit; and thus they would have got a lien upon as much property in value, as they would have lost by the foreclosure of the first mortgage. In short, whatever election between the two mortgages the owners of the fund might have made, the Trust Company would have remained unharmed. But how is it now? After the owners of the fund had got all which they had any right to claim from their land security, and had left the Trust Company nothing more than its just rights, they filed this bill, and have obtained a decree charging the lands conveyed to the company with the payment of more than eighteen thousand dollars. I can see no just foundation for such a decree, nor for any decree, against the company.

It is possible that the lands covered by the first mortgage would have brought more on a sale in the fall of '42, than was realized from the sale under the second mortgage. But it is evident from the nature of the case as detailed by the witnesses, that it is now utterly impossible to determine, with any degree of accuracy, what the lands in the first mortgage would have brought at that time. There can at the most be nothing better than mere conjecture, without any such certainty as is necessary for the basis of a judicial determination.

In any view which I have been able to take of the case, we are brought to the same conclusion. I am of opinion that the decrees of the court of chancery and the supreme court should be reversed; that the bill should be dismissed; and that the Trust Company should have costs in the courts below. It is not usual to give costs in this court on the reversal of a decree.

RUGGLES, J. delivered an opinion in favor of reversing the decree, concurring substantially in the views of BRONSON, J

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GARDINER, J. also delivered an opinion for reversal upon similar grounds. He further remarked as follows :

It was insisted that the equitable doctrine of marshalling securities affords the nearest analogies and best guide for the interpretation of the acts of the complainants in reference to the two securities in question. I am unable to perceive any analogy between the cases. The familiar principle, that if one party has a lien on two funds for a debt, and another party a lien on one of those funds for another debt, equity will compel the former to resort to the fund in which he has an exclusive interest in the first instance for satisfaction, has no application to these parties. To authorize the interference of a court of equity in the case supposed, the first creditor must have a lien upon, or interest in, each of the funds, with the right as between him and his debtor, to resort to both or either of them for satisfaction. But the complainants in interest in this cause, as we have seen, never had a lien upon both of these mortgages. They had an election which of the two they would take, and when that was determined, the exclusive and absolute right to the one chosen, and that only.

There is another, and to my mind an insuperable objection, to the maintenance of this suit. The equity by which the complainants would avoid the effect of their own deliberate acts in affirmance of the second mortgage and a ratification of the act of the clerk in discharging the first, is an equity in behalf of the Trust Company, and not in favor of the complainants.

The design of Jones and Graham and the clerk, as we have seen, was to substitute the second for the first mortgage. They failed in this, as the complainants allege, in consequence of not obtaining the sanction of the court. The appellants, who in good faith advanced their money, relying upon the validity of the discharge of the original mortgage executed by Walworth, must lose all, or be remitted to the second security. This is *their equity*. It results from the election of the complainants to avail themselves of their legal right to the first mortgage. How can this equity be invoked by the complainants to sustain this suit? By what right did they constitute themselves the

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guardian of the Trust Company, and undertake, by foreclosing the second mortgage, to determine for the latter the time and circumstances under which they shall enforce a claim implied in equity exclusively in their favor? The foreclosure of the second mortgage, without adopting the acts of the clerk in discharging the first, in virtue of the equity above mentioned, and without making the appellants parties to the suit, if not a fraud upon them, was without color of right.

The supposed trust in favor of the appellants, with which the complainants now claim they were affected, was not suggested or alluded to in that suit, but they foreclosed as the rightful and absolute owners of the second mortgage. I think they must be concluded by their election to accept the second security, made under the circumstances and with the knowledge disclosed by the pleadings and proofs in the cause.

The bill can be sustained only upon the assumption that the second mortgage was given as additional security for the same debt, an assumption without proof and entirely repugnant to the arrangement of the parties and the purpose for which it was executed. The decrees of the supreme court and of the assistant vice chancellor must be reversed.

And thereupon the decrees of the assistant vice chancellor and of the supreme court were reversed, and the bill ordered to be dismissed with costs in the courts below, but not on this appeal.

VANDERHEYDEN and wife, *appellants*, vs. MALLORY and HUNTER, *respondents*.

The separate estate of a married woman is not liable at common law for her debts contracted before marriage; and the only ground on which it can be reached in equity, is that of appointment, i. e. some act of hers *after marriage* indicating an intention to charge the property.

The bankruptcy of the husband, although it extinguishes the debt as to him, and suspends the legal remedy as to her during the coverture, does not afford any ground for proceeding in equity to charge her separate estate.

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The creditor in such a case may prove his debt and share in the distribution of the bankrupt's estate.

A *feme sole*, having contracted a debt, and owning some shares of bank stock, married. After marriage, the stock, with the consent of the husband, was transferred to a third person for the purpose of having it transferred back to her for her sole and separate use, which was accordingly done. She also held other shares of bank stock which had been transferred to her separate use by the executor of her father's estate. The creditor sued the husband and wife at law, and being met by a plea of the husband's bankruptcy, discontinued. He then filed a bill in equity for the purpose of reaching the bank stock. No fraud in the transfer to the wife's separate use being alleged, nor any act of the wife after marriage indicating an intention to charge this fund; *held*, that the bill could not be sustained.

It seems, that when a debt is contracted by a woman during coverture, either for herself or as surety for her husband, this will be *prima facie* evidence of an appointment or appropriation of her separate estate to the payment of the debt.

But this doctrine has no application where the debt was contracted by the woman before marriage. The act of marriage does not raise an appointment; nor does a promise by her and her husband to pay the debt out of some other fund not conveyed to her separate use, e. g. a legacy or distributive share in her former husband's estate, enable the creditor to reach her separate estate.

The law casts upon the husband a temporary liability for the debts of the wife contracted before marriage. This liability ceases with the *coverture*, unless judgment has been recovered against both. If the wife survive the husband and judgment have not been recovered, her sole liability revives. *Per* JEWETT, C. J.

The bankruptcy of the husband extinguishes the liability as to him; but it revives against the wife if she survive her husband. *Per* JEWETT, C. J.

APPEAL from chancery. Joel Mallory and John Hunter filed their bill in the court of chancery against Levinus Vanderheyden and Lenchy his wife, stating the case in substance as follows: Between the 30th day of April, 1835, and the 6th day of December, 1837, the said Lenchy being during that period the widow of John J. Bradt and a *feme sole*, became indebted to the complainants in the sum of \$2022,96, for goods sold and moneys advanced at different times. The bill averred that the complainants credited her in this sum upon the knowledge that she was entitled to a large amount of property from the estate of her late husband. The complainants were indebted to the estate of Bradt in a large sum, and while their account was accruing against Lenchy she agreed with them that she would make an arrangement with the executor of

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Bradt to have such account applied against their indebtedness to that estate.

On the 6th of December, 1837, the said Lenchy and Levinus intermarried, and between that time and February, 1843, they frequently promised that the account against Lenchy should be arranged in the manner above stated, and in the expectation that this would be done the complainants neglected to enforce the demand: but about the time last stated they refused to make such arrangement or any other for the payment of the debt. The complainants therefore, in May, 1843, instituted a suit in the supreme court against Vanderheyden and wife upon such account, to which they pleaded in bar that on the 17th day of April, 1843, the said Vanderheyden was discharged as a bankrupt from all his debts under the act of congress passed August 19, 1841. This plea was true in fact, and the complainants, being advised that it was an effectual bar, discontinued the suit.

The bill further stated that during the time the complainants' account was accruing against Lenchy, she was worth a large amount of property bequeathed to her by her late husband, a large part of which was unpaid to her and yet remained in the hands of the executor, but a portion of which had then been received by her and invested in bank stocks; that before any part of the complainants' demand accrued against her, she was the owner of thirty-five shares of bank stock, (the value of which was \$2100,) which stood in her own name; that she continued to be the owner of these shares while such demand was accruing, and was still the owner thereof in her own right; that after her marriage with Vanderheyden, she, with the advice and consent of her husband, transferred said thirty-five shares to a third person, for the purpose of having the same transferred back to her for her sole and separate use, which was immediately done, so that at the filing of the bill *she held those shares in her own name and to her sole and separate use*: also that at the filing of the bill she was the owner in her own right of nineteen other shares of bank stock, received by her out of the estate of her father, and which the executor of that estate

had transferred to *her sole and separate use*: also that she was possessed in her own name and right of a large amount of other property.

The prayer of the bill was that Lenchy Vanderheyden might be decreed to pay the complainants' demand, and to apply for that purpose her separate property before mentioned, or so much thereof as should be necessary, and for general relief. The defendants demurred to the bill, as well generally for want of equity, as for reasons more specially assigned. Their demurrer was overruled by the vice chancellor of the third circuit, to whom the case was referred for hearing, and his decision was affirmed by the chancellor on appeal. The defendants appealed to this court.

N. Hill, Jr. for appellants. I. The debt in question was not contracted under circumstances giving the respondents a right to proceed against the separate property of Mrs. Vanderheyden, nor has any thing been done by her since which gives such right. It was contracted by Mrs. Vanderheyden as a *feme sole*, and the bill does not pretend that the bank stock in question was even an inducement to the credit given her. On the contrary, it alleges that the complainants relied upon means which they *expected she would derive* from the estate of her former husband, and not upon the bank stock, which she *then owned*. The subsequent acts of Mrs. Vanderheyden show no intention to charge the bank stock with the complainant's debt, but only the property held by Bigelow, as executor of her former husband. The only ground upon which the separate estate of a *feme covert* can be reached in equity is that of appointment; i. e. some act on her part *clearly evincing an intention to charge the property proceeded against*. And as to the bank stock in question, such an intention, so far from being shown, is disproved by all the circumstances. (2 *Story's Eq.* § 1399; 2 *Rep. Husb. and Wife*, 241 to 244.)

But the doctrine of *appointment* has no application to this case. That relates exclusively to acts done by married women *as such*; and there is no pretence that Mrs. Vanderheyden,

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since she married her present husband, has done any act which can be construed into an appointment, either express or implied. (2 *Story's Eq.* §§ 1398, 1399, 1400.) No case holds that the mere act of marriage raises an appointment by implication; and therefore the most the complainants can claim is, that their demand is a *general debt* of the wife, contracted on her *general personal responsibility*. And the authorities agree that, for such a debt, her separate property cannot be reached in equity, any more than at law. (2 *Story's Eq.* § 1398; 2 *Rop. Husb. and Wife*, 241 to 244.) The chancellor does not put his decision upon the doctrine of appointment, but upon an assumed equity, arising out of the husband's discharge in bankruptcy; and he admits that no precedent can be found for the decision except *Biscoe v. Kennedy*, (1 *Brown's Ch. Cas.* 18, *note*.) We contend that he erred, for the following reasons: 1. The husband's discharge in bankruptcy creates no such equity as against the wife. Though the remedy by action is barred, the creditor can prove his debt, under the commission, and thus reach the property of the husband not only, but all the property of the wife not settled to her separate use. (*Bankrupt Act*, 1841, § 3; 4 *Paige*, 73, 4.) 2. The same species of equity exists, therefore, upon principles of natural justice, where the remedy by action proves inadequate; by reason of the husband's pecuniary inability: and yet no one pretends that this furnishes ground for charging the wife's separate estate. 3. The decision subjects the separate property of the wife for her *general debts*, contracted upon her *general personal responsibility*, which is contrary to law. (2 *Story's Eq.* § 1398; 2 *Rop. Husb. and Wife*, 241 to 244.) The case of *Biscoe v. Kennedy*, relied on by the chancellor, ought not to govern the present question. It is not found in any regular series of reports, but only in a note furnished the reporter by counsel. It has never been acted upon, or even referred to since, by any judge or writer, till the decision of this case. (*Ram on Leg. Judg.* 49, 50.) *Brown's Reports* are at best but poor authority. (*Greene's Overr. Cas.* 57; *Ram on Leg. Judg.* 101.) The particular reasons for the decision are not stated, and cannot be ascertained. (*Id*

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21.) The controlling reason may have been that the husband was regarded as civilly dead after outlawry, and the wife thus restored to her capacity as a *feme sole*. (2 *Kent's Com.* 158; 2 *Wm. Bl. Rep.* 1081, 2.) Or the reason may have been that the settlement on the wife was fraudulent as to creditors, and so the property was the husband's; that being the only ground taken by the counsel who argued the cause. The absence of all reliable authority in favor of the principle assumed by the chancellor, tends strongly to prove that no such principle exists. (*Ram on Leg. Judg.* 156, 7.)

II. The discharge in bankruptcy of Mr. Vanderheyden operated as an extinguishment of the debt against his wife, at least during coverture. The debt was proveable under the bankrupt act, and therefore is extinguished, at least during coverture. (*Bank. act*, §§ 4, 5; 12 *Verm. Rep.* 510, 511; 13 *Pick.* 64, 67.) The very fact that the bankrupt act operated to discharge the husband is conclusive to show that the complainants' claim is a *debt*, within the meaning of the act. If so, it is extinguished. The discharge operates upon the debt in the same manner as a *release of the husband by the creditor*, and of course extinguishes it. Moreover, it has been expressly decided that the wife's debts *dum sola*, are absolutely extinguished by the husband's discharge as a bankrupt or insolvent. (2 *Nev. & Mann* 255; 10 *Mod. Rep.* 243; 1 *P. Wms.* 249; *Gilb. Eq.* 318; *Reeve's Dom. Rel.* 71; 2 *Kent's Com.* 146.) The reasoning on which these cases are based applies to the remedy in equity as well as at law. And the bankrupt act declares, moreover, that the certificate shall be a full and complete discharge of *all debts*, in all courts, &c. and may be pleaded as a full and complete bar to *all suits* brought in any court. (*Bank. act*, § 5.)

III. The bill is not framed to reach the bank stock on the ground that there was fraud in transferring it to the wife's separate use. On the contrary, it treats the bank stock as her *separate property*, and seeks to reach it *as such*, thus conceding the validity of the transfer.

IV. There is no equity in this case. The bill shows that independent of the bank stock, the husband acquired a *large*

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amount of property from his wife. The complainants might have reached this by due diligence, but chose to wait until the husband's other creditors had exhausted it, and now claim to seize the small remnant in question. The wife has been obliged to submit to the *disadvantages* arising from bankruptcy, and is therefore entitled to share in its *advantages*.

V. But the bill shows that the complainants have not exhausted their remedy against the husband's estate. Equity requires that they should prove their debt under the commission, and only resort to the wife's separate property for the balance.

D. Buel, Jr. for the respondents. I. The doctrine established in the courts of equity in the earlier as well as in the more recent cases is, that a married woman, as to her separate property, is to be deemed a *feme sole*, and therefore that her engagements, although they would not bind her person, should bind her separate property. Among the numerous early cases are the following: *Peacock v. Monk*, (2 *Ves. sen.* 190;) *Hulme v. Tenant*, (1 *Brown's Ch. C.* 16,) and the cases cited in *Mr. Eden's note*; *Lillia v. Airey*, (1 *Ves.* 277;) *Balpin v. Clarke*, (17 *id.* 277.) The most recent cases in England accord with the early cases, and establish the position, that if a *feme covert* having separate property obtains credit, her separate property shall be subject to the debt without any special appointment or charge, written or verbal. (*Murrey v. Burlee*, 4 *Simons' Ch. Rep.* 82, *S. C.* 6 *Eng. Ch. R.* 43; *Same case on appeal to Ld. Ch. Brougham*, 3 *Mylne & Keen*, 209, and 9 *English Ch. R.* 1; *Owen v. Dickinson*, 1 *Craig & Philip*, 48.) The American cases, and especially those decided in the court of chancery of this state, and the late court of errors, go the full length of the earlier and more recent English cases. (*N. A. Coal Co. v. Dyott*, 7 *Paige*, 9, *S. C. on appeal*, 20 *Wend.* 570; *Gardner v. Gardner*, 7 *Paige*, 112, *S. C. on appeal*, 22 *Wend.* 526; *Jacques v. The Methodist Episcopal Church*, 17 *John.* 548, *per Spencer, C. J. and Platt, J.*)

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II. The facts stated in the bill and admitted by the demurrer present at least as strong a case for the exercise of the power of the court over the separate property of Mrs. Vanderheyden, as would have been presented if the debt had been contracted subsequently to her marriage to Vanderheyden, for, 1. The debt was contracted on the credit of her being the owner of property derived from her former husband, and from her father, which she has continued to own, and still enjoys. 2. The stocks sought to be subjected to the complainants' debt were transferred to her sole and separate use on the advice of her husband, and shortly before his bankruptcy, and were thus kept from passing into the hands of the assignee in bankruptcy; and 3. Vanderheyden, by his discharge in bankruptcy, is forever exonerated from personal liability for the debt, and no suit at law can be brought against his wife during her husband's life. (*Miles v. Williams*, 1 P. Wms. 258.)

The consequence of denying the prayer of the bill would be to enable Vanderheyden to make use of his bankrupt discharge, not only to rid himself of his own debts and free himself from suits for his wife's debts, but by a new species of subrogation to take the place of her creditors in respect to her separate property, and instead of having it applied to pay debts which were contracted on the credit of it, quietly enjoy it himself. It is not strange the chancellor felt so strongly the injustice of allowing the defendants to put the complainants at defiance, in respect to the wife's separate property, as to induce him to declare that if a precedent for granting the relief asked for was wanting, he should deem it his duty to make one. But the chancellor did not find it necessary in this case to change the law or make a precedent. A case was decided by Sir Thomas Clarke, master of the rolls in 1762, which is analogous and fully sustains the grounds on which the bill was filed. (*Briscoe v. Kennedy*, 1 Brown's Ch. C. 18, reported by Mr. Eden in note to *Hulme v. Tenant*.) The only difference between that case and ours is, that in *Briscoe v. Kennedy* a suit at law was instituted against husband and wife, and the husband (who

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was out of the realm,) prosecuted to outlawry before the court sustained the bill. But outlawry in *civil cases* is a mere process. It is not civil death, nor equivalent to a divorce. (*Bac. Abr. Outlawry, D. 2.*) In our case, the defendants in the suit at law, pleaded the bankrupt discharge. In both the remedy at law was resorted to and exhausted before filing the bill. The authority of *Briscoe v. Kennedy*, therefore, furnishes a precedent in point.

III. But it is objected that the effect of the bankrupt discharge of Vanderheyden was not only to exonerate him from the claim, but that it cancelled the debt against the wife and her property, and destroyed all remedies in equity as well as at law for the debt. This proposition, which the appellants' counsel endeavored to sustain by a remark of Ch. J. Parker, in *Miles v. Williams*, (1 *P. Wms.* 258,) we deny. The point was not involved in that case. And so the chief justice virtually admits. He says: "It will be a discharge to her, at least a temporary one, viz: during the husband's life. *But though it be not necessary to give any opinion upon that, yet I think it will amount to a perfect release, and the wife will be discharged forever.*" The opinion respecting the effect of the certificate being an absolute discharge of the wife from the debt, is clearly and avowedly an *obiter dictum*, and no decision sanctioning it as law in any case where the question directly arose, can, we think, be produced. It would destroy the symmetry of the law respecting the relation of husband and wife. If the wife dies before judgment is obtained against the husband, he is not liable; but if she survives him, she is liable. Why should a discharge of the husband in bankruptcy have a greater effect in releasing the wife's debts, contracted *dum sola*, than his death? (*Clancy on the rights of married women*, 13 to 16; *Reeve's Dom. Rel.* 68, 69; 2 *Kent's Com.* 143, 144, 4th ed.; *Woodman v. Chapman*, 1 *Camb. R.* 189, and notes; *Heard v. Stamford*, 3 *P. Wms.* 409) There is nothing in the bankrupt law of 1841 that gives to the discharge of the husband the effect contended for by the appellant. The 4th section pro-

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vides, that every bankrupt complying with the provisions of the act "shall be entitled to a full discharge from all his debts." As the wife's debts did not become his debts by the marriage, why should a discharge from his debts release the debts against her? The common law doctrine, that if one of two or more joint debtors is released, the release operates to discharge the others, cannot apply; for the husband is in no sense a joint debtor with the wife, as to her debts contracted *dum sola*, before judgment obtained against them.

IV. If it is objected that the stocks are not held by a trustee, but invested in Mrs. Vanderheyden's own name, we answer, that the husband will be deemed her trustee; and it was therefore necessary to make him a party to this bill. (2 *Kent's Com.* 4th ed. 162, and note (b,) in which the authorities are collected; also 2 *Story's Eq.* 3d ed. § 1380, and note 3.)

V. As to the objection that the complainants should have resorted to the assets of Vanderheyden, in the hands of the assignee in bankruptcy; we answer, 1. That it will be time enough to meet that question when it shall be set up in the defendants' answer and proved that any assets were transferred. 2. Vanderheyden was a voluntary applicant and must have been insolvent, and the court on a demurrer to the bill will not presume that the debt may have been satisfied out of property in the assignee's hands. 3. As this debt was not the debt of Vanderheyden, (as before shown,) it is questionable whether the complainants would have a right to claim distribution of any assets which Vanderheyden may have possessed. They cannot be considered as creditors of Vanderheyden. He was never their debtor. It seems clear, therefore, that they could not come in for distribution if there were any effects to distribute. (*Bankrupt act*, § 5.) But if there were assets of Vanderheyden in the hands of the assignee, and if such assets could legally be applied towards this demand, it would be more equitable to leave them for *his* creditors, and require the complainants to seek satisfaction for their demand out of property on the faith of which the credit was obtained.

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JEWETT, Ch. J. By the common law a married woman is disabled from disposing of either real or personal estate during the marriage, with the exception of the former by fine, and, by our law, by any legal conveyance executed under a due examination; and of the latter with the privity and concurrence of her husband. That being the legal rule, a married woman cannot, at law, bind herself personally by any contract in regard to her separate property. In conformity with this principle courts of equity hold that her *general* personal engagements will not affect her separate property. And to this extent courts of law and equity act in concert. But as a consequence of the principle established that a married woman may take and enjoy property to her separate use, courts of equity enable her to deal with it as a feme sole. The right of disposition or appointment is an incident belonging to such interest and power. She may sell, pledge, or incumber her separate estate when she shows an *intention* so to dispose of it, in the same manner as if she were a feme sole, unless specially restrained by the instrument under which she acquires it; and every security thereon executed by her is to be deemed an appointment *pro tanto* of the separate estate. (*Hulme v. Tenant*, 1 *Brown's Ch.* 16; *Fetteplace v. Gorges*, 1 *Ves. jr.* 46; 2 *Story's Eq. Jur.* §§ 1392, 1399; *Jaques v. The Methodist Epis. Church*, 17 *John. R.* 549; *Gardner v. Gardner*, 22 *Wend. R.* 526.)

The great difficulty is, to ascertain what circumstances, in the absence of any positive expression of an *intention* to charge her separate estate, shall be deemed sufficient to create such a charge, and what sufficient to create only a general debt. But it is agreed, that there must be an *intention* to do so, otherwise the debt will not affect her separate estate.

The fact that the debt has been contracted by a woman during her coverture, either as a principal or as a surety, for herself, or for her husband, or jointly with him, seems ordinarily to be held *prima facie* evidence to charge her separate estate

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without any proof of a positive agreement or intention so to do. (2 *Story's Eq. Jur.* § 1400.)

The doctrine of appointment or appropriation in equity, however, relates wholly to engagements made or debts contracted by a married woman, *as such*, having a separate estate, and in reference to it. It has no application to debts contracted or engagements entered into by a feme sole.

The bill contains no allegation that Mrs. Vanderheyden, after her marriage with her present husband, did any act or made any engagement with or promise to the complainants in reference to their debt against her or in reference to her separate estate, other than, it is alleged, that soon after the intermarriage of the defendants and at several different periods subsequently, one of the complainants made application to them, urging them to make some arrangement by which the application of the debt due to the complainants from said Lenchy would be made on the debt which they owed the estate of Bradt in the hands of his executor, and that they, until about the month of February, 1843, constantly upon every request so made, evincèd a desire to have an arrangement made with the executor of Bradt by which such application would be made, and that they agreed that such an arrangement should be made. This is all that the bill contains of acts charged upon Mrs. Vanderheyden since she has been a married woman, to sustain a claim of an appointment in equity by her for the payment of the complainants' debt out of her separate estate; and this, it seems to me, falls far short of bringing the claim within any principle heretofore established in equity. Even if Mrs. Vanderheyden had contracted the debt subsequently to her marriage with Vanderheyden, the facts charged expressly negative the idea that she *intended* to pay, or that the complainants expected to be paid, their debt, out of what is now denominated her separate estate. The allegation in that respect is, that there was a large amount due to her from, and that she had a claim upon, the estate of her late husband, Bradt, out of *which* she agreed to make an arrangement with his executor to enable the complainants to have applied upon

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the debt which they owed Bradt in the hands of his executor, the amount of the debt which she had contracted and should contract with the complainants, and that the complainants knowing that she was thus entitled and would have abundant means therefrom to pay any debt she might contract with them, credited her. It is nowhere alleged that any part of the amount to which Mrs. Vanderheyden was entitled from the estate of her former husband, out of which she promised to pay, and out of which the complainants expected to be paid in the manner stated, has ever come to her hands. For any thing appearing in the bill, the same remains in the hands of Bradt's executor, or has been collected and received by Vanderheyden, or if not, has passed to the assignee in his proceedings in bankruptcy. The thirty-five shares of bank stock was owned and held by her from 1833 to July, 1842, when it was formally transferred to her for her separate use. The residue of the stock which is now held by her in that character did not come from the estate of her former husband. It is a part of her share bequeathed to her by her father. And although it is alleged that Mrs. Vanderheyden now holds in her own right and name a large amount of other property, it is not averred that it was all or any portion of her share in, or claim upon, her former husband's estate, in the hands of his executor, at the time of the accruing of her indebtedness to the complainants, in reference to which exclusively, she when sole, and she and her present husband since their intermarriage, it is alleged, so agreed to make an arrangement respecting the payment of the complainants' debt. Therefore I see no ground stated in the bill, which would authorize a court of equity to subject the separate property of Mrs. Vanderheyden to the payment of the complainants' debt against her. There is nothing which gives countenance to the idea, that she ever, either before or since her marriage, made any contract with the complainants indicating any *intention* to affect by it the property which she now holds to her separate use; but on the contrary, the bill expressly negatives such intention. The whole dealing and contract, as well prior as subsequent to her marriage, referred to other and dif-

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ferent property as the means of paying the debt contracted by her. It is true, that prior to her marriage all of her property was liable for the payment of this debt upon a judgment and execution against her; and even after her marriage her separate property might have been subjected to it upon a judgment and execution against her and her husband, if the transfer of it or any part of it to her separate use was fraudulent as against her creditors; but that is not alleged, and of course no decree at any time, either before or since the discharge of the husband, could be made subjecting such separate property to the payment of the debt upon that ground.

It is further insisted by the defendants that the discharge in bankruptcy of the husband operated as an extinguishment of the debt against the wife, at least during coverture. It is argued that it extinguished the husband's liability for the debt. It could not operate to extinguish the debt as against the wife, unless it was the husband's debt absolutely and exclusively. The effect of the discharge is to extinguish his, not her debts. By the marriage, the law cast upon the husband a contingent and temporary liability for all the debts and demands against the wife contracted by her before coverture, if sued and judgment recovered against both, before her death, but not after. If the wife survive her husband, her sole liability revives. She may then be sued upon all her contracts made before marriage, which remain unsatisfied. The husband's liability is gone by his death, and no liability is left upon his representatives. (1 *Chit. Pl.* 44.)

The case of *Miles v. Williams*, (1 *P. Wms.* 249,) was referred to as an authority to show that the debt is extinguished by the discharge, as well against the wife as the husband. That was an action of debt against husband and wife, upon a bond made by the wife *dum sola*. The defendants jointly pleaded in bar the discharge of the husband in bankruptcy after the intermarriage, to which the plaintiff demurred. One question was whether, it being debt on a bond given by the wife *dum sola*, it was such a debt as should be discharged by the bankruptcy of the husband by virtue of the statute 4th Ann, ch. 17,

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mentioned in the plea. The words of the clause upon which it depended are, "that the bankrupt shall be discharged from all debts by him due and owing at the time he became bankrupt;" and then, in case he be sued for any such debt, the act directs "that he shall and may plead in general that the cause of action did accrue before he became bankrupt." It was held that it was the husband's debt within the meaning of the statute, and that the discharge was therefore a bar to the action. And as to the wife, it was said that it was a discharge as to her, at least a temporary one, to wit, during the husband's life; and the chief justice added, that he thought it would amount to a perfect release, and the wife would be discharged forever. But it was admitted that the decision of that case did not call for any opinion as to the effect of the discharge upon the debt in regard to the wife.

The 4th section of the United States bankrupt act of August, 1841, provides that every bankrupt who shall *bona fide* surrender all his property," &c. shall unless, &c. "be entitled to a full discharge from all his debts, to be decreed and allowed by the court which has declared him a bankrupt, and a certificate thereof granted to him by such court accordingly upon his petition filed for such purpose." "Provided, that no discharge of any bankrupt under this act shall release or discharge any person who may be liable for the same debt as a partner, joint contractor, endorser, surety or *otherwise*, for or with the bankrupt." And again; "And such discharge and certificate, when duly granted, shall in all courts of justice be deemed a full and complete discharge of all debts, contracts and other engagements of such bankrupt, which are proveable under this act, and may be pleaded," &c.

That this debt, as against the husband in his proceedings in bankruptcy, was proveable, admits of no doubt; but that does not necessarily affect the question whether the discharge operated to extinguish the debt as against the wife. Unless it was a debt proveable under the act, the husband would not be discharged from it, for the discharge as to him only operates upon debts of that character.

The difficulty in holding the husband's discharge to be an extinguishment of the *debt* absolutely, is raised by the principle that the debt existing against the wife before coverture is not transferred from her to the husband by the marriage. The legal effect of that is to suspend the individual liability of the wife, and to create and cast upon the husband and wife a joint liability for the payment of the debt, to continue during the coverture and no longer, unless in the mean time judgment shall be recovered against them. And when that terminates by the death of either, the liability thus created ceases; and if the wife survive her husband, her individual liability for the debt revives, unless indeed the debt is paid, released, or judgment is recovered during the coverture. The *nature* of the debt is not changed by marriage; that is only done by the recovery of a judgment against the husband and wife. It then becomes the debt of the husband, and may be enforced against him and his property after the death of the wife. And in case of the death of the wife leaving her husband surviving, he is no longer liable for the debts of the wife contracted by her before marriage, where a judgment has not been recovered: but he as her administrator would be liable for such debts to the extent of the assets which he should receive, if he took administration on her estate to which he would be entitled; and if he should not take administration on her estate, he would be presumed to have assets in his hands sufficient to satisfy her debts, and would be liable therefor. (1 *R. S.* 75, § 29; 2 *Kent's Com.* 5th ed. 116, 411.) My conclusion is that the husband's discharge operated to extinguish his liability for the debt of the wife, and would be a bar, if pleaded, to any action brought against him and his wife for the recovery of any debt contracted by her before their marriage, and to suspend the remedy for the recovery of such debt as against the wife during coverture.

The chancellor did not (as the vice chancellor seems to have done) place his decision upon the doctrine of appointment in equity by the wife for the payment of the debt, but upon a supposed equity resulting from the fact that the husband's liability for the debt had been extinguished by his discharge under the bank

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rupt act, and the complainants' remedy at law against the wife and her estate suspended during coverture. And upon this ground the chancellor held that they could come into a court of equity to subject her separate property to the payment of their debt, although the husband is still living, and although the wife's separate estate, during the life of her husband, is not liable, generally, for debts contracted by her before the marriage. The only case relied on by the chancellor as an authority for his decision is the case of *Biscoe v. Kennedy*, (1 *Brown's R.* 18, n.) decided at the rolls in 1762, which was this: The defendant, Jane Kennedy, when a *feme sole*, was indebted to the plaintiff, Biscoe, in £114, by bond, 22d April, 1755, and was possessed of several leasehold houses and £1000 East India stock. By settlement, on her marriage with the defendant James Kennedy, all her personal estate (excepting £500 East India stock which the husband was to have) was conveyed to the defendant MacCollock, in trust for the separate use of the defendant Jane. The marriage having taken effect, the plaintiff filed his bill (without having sued the husband) to have the separate estate of the wife applied to the payment of the debt; which was dismissed. The plaintiff then sued out writs against the husband and wife; but the husband absconding, could not be served, and the plaintiff proceeded to outlawry, and then filed the bill to be paid out of the separate estate of the wife. The defendant insisted that during her husband's life her separate estate was not liable to this debt, contracted by her while sole. The plaintiff contended that the settlement was, as to him, fraudulent. The master of the rolls, upon the hearing, declared that upon the circumstances of the case the effects of the defendant vested in her trustee were to be considered as the property of a *feme sole*, and ordered the plaintiff's debt and costs to be paid out of the £500 East India stock in the hands of her trustee.

The declaration that the property vested in the trustee for the use of the wife should be considered as the property of a *feme sole*, was in accordance with well settled principles, and in regard to which it is well settled that she is to be treated as a *feme sole*, having the general power of disposing of it, but

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without capacity to charge herself personally. But upon what principle the decree followed that the debt should be paid out of her separate property, during the lifetime of her husband, is not clearly stated, and cannot with any certainty be ascertained from the statement of the case or the decision of the court. The ground may have been that the wife was deemed to be restored to her capacity as a *feme sole*, capable of suing and being sued without her husband, regarding him as *civilly dead* after the outlawry, (2 *Kent's Com.* 154, 5th ed.; 2 *Bac. Abr. tit. Baron and Feme*, M. 64; *Hyde v. Price*, 3 *Ves. jun.* 444.)

If by the discharge of the husband in bankruptcy, an equity is created against the wife, to subject her separate property to the payment of the debt during the life of her husband, it would be difficult to give a good reason why such equity would not arise in every case where such creditor had exhausted his remedy against the husband and wife at law and in equity without satisfying his debt by reason of the pecuniary inability of the husband, and yet it has not as yet been suggested that such equity would arise in that case. The right of the creditor to be paid his debt, would be no stronger in the one case than in the other, and the remedy would be no more inadequate to meet the justice and equity of the case in the one than in the other. By the decree declaring the husband a bankrupt, all the property and rights of property of the wife to which the husband became entitled, either absolutely or qualifiedly, by the marriage, undisposed of previously, in addition to his other property, by operation of law became vested in the assignee in bankruptcy, subject to the wife's right by survivorship; (*Van Epps v. Vandeusen*, 4 *Paige*, 73; § 3 of the *U. S. Bankrupt act of August*, 1841; *Mitford v. Mitford*, 9 *Ves. Jr.* 87;) in which the complainants were entitled to share on proving their debt *pro rata*, with all the other creditors of the husband, with certain exceptions specified in the bankrupt act. (See § 5.) And this is the remedy given by law to the creditors of a bankrupt to meet the equity and justice of their case; and for any thing alleged in the bill, the complainants might have realized their entire debt if they had pursued this remedy. At all events, if

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they refuse or neglect this remedy, they do not present any very high claim upon a court of equity, to alter the law to enable them to have applied the separate property of the wife, to the payment of their debt, in advance of the legal period, when it might be so subjected, namely, when the marriage shall be dissolved by the death of either husband or wife. There is no remedy for the wife to have applied any portion of the property which passed to the assignee in bankruptcy, to satisfy the complainants' debt. But *they* have such remedy, and although they have a remedy upon the separate property of the wife on the termination of the marriage by the death of either husband or wife, I think the wife has a strong equity against the complainants, requiring them to assert their right under the proceedings in bankruptcy.

The equity which the chancellor assumed, as arising out of the husband's discharge in bankruptcy, in this case, is very nearly akin to the equity which prevailed in the case of *Freeman v. Goodham*, (1 *Cas. in Chan.* 295,) where a *feme sole* bought goods, but did not pay for them, and afterwards married and died, having brought a good portion, which came to the hands of her husband, who, on the creditor's filing a bill against him to be paid for the goods, demurred; and when Lord Chancellor Nottingham overruled the demurrer, saying with some earnestness, *that he would change the common law in that point*. And in the case of *Powell v. Bell*, (*Abr. of Cases in Eq.* 16; *Pre. in Chan.* 256,) where it was decreed that the wife who had contracted debts *dum sola* being dead, the husband should account for what he had received with her, and should be so far liable to her debts; it being insisted that one precedent relieving a creditor, was more to be regarded than three to the contrary. But these cases were disregarded or overruled, and the principles of the common law sustained and applied under the like circumstances, in *Earl of Thomard v. Earl of Suffolk*, (1 *P. Wms.* 470,) and in *Heard v. Stamford*, (3 *id.* 409.) The last case was this. A *feme sole* was indebted to her sister in £50, by note. She married and brought a personal estate to the value of £700 to her husband, with whom

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she lived about a year and a quarter, and then died. The creditor by note never recovered judgment against the husband and wife, and the debt remained unpaid. The husband, on the wife's death, administered to the wife. The sister married, and with her husband brought a bill against the defendant, and finding that the *choses in action* of which the wife died possessed were not sufficient to pay the £50 debt which the wife owed *dum sola*; it was prayed that the defendant, the husband, for so much as he had received out of the clear personal estate of the wife upon his marriage, should be made liable to answer the plaintiff's demand. And it was insisted to be but common reason and justice, that as the wife was the owner of a visible estate upon the credit of which the plaintiff might have entrusted her; so he that had such estate should pay the debt, which he might well afford to do; that it would be a case full of hardship, if a *feme sole* who, in ready money, goods, jewels, &c. might be worth £10,000, and might owe £1000, should afterwards marry and die, that on her death her husband should go away with the £10,000, and not be obliged to pay one farthing of his wife's debts. This would prove of the most pernicious consequences to the creditors; whereas, on the other hand, the husband could have no reason to complain of being liable to answer their demands, as far as he had received a fortune with his wife; and the cases of *Freeman v. Goodham* and *Powell v. Bell* were cited to show that such equity had been established under like circumstances. But Lord Chancellor Talbot said it was extremely clear, that by law the husband was liable for the wife's debts only during coverture, unless the creditor recover judgment against him in the wife's lifetime; and that he did not see how any thing less than an act of parliament could alter the law; that the wife's *choses in action* were assets, and would be liable, but they, it seemed, were not sufficient in the principal case to answer the demands; that in the case of *Freeman v. Goodham* there was some reason for the court to be provoked, when the goods themselves continued, after the death of the wife, in the hands of the husband, who notwithstanding refused to pay for

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them. If he relieved against the husband because he had sufficient with his wife wherewith to satisfy the demand in question; by the same reason, where a feme indebted *dum sola* afterwards marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, he ought to grant relief to the husband against such judgment, which he said was not in his power; consequently there could be no ground for a court of equity to interpose in the case before him; that if the law, as it then stood, be thought inconvenient, it would be a good reason for the legislature to alter it; but till that was done, what was then law must take place. The remarks of the lord chancellor in that case may well be applied to the circumstances of this case.

It is extremely clear, that by law the wife, or her separate property, are not liable for the debts which she owed *dum sola*, during the life of her husband; and I do not see how any thing less than an act of the legislature can change the law. And from the circumstances of this case, I do not discover any reason even, for the court to be provoked on account of the existence of such rule of law; as it seems that the wife carried to the husband a large personal estate irrespective of her separate property, the same to which she was entitled and which induced the complainants to give her the credit, and that nearly five years elapsed after the marriage, before the husband applied to be decreed a bankrupt, during which period it is fair to presume the complainants might have collected their debt; by proceedings against the husband and wife, out of the property which the husband received or might have received by the marriage, and which has passed to the assignee in bankruptcy; and even there, the complainants have neglected to go for their share of it. Upon the whole, I think the decree of the vice chancellor, and the affirmance of it by the chancellor, were erroneous, that it should be reversed, and the complainants' bill be dismissed with costs.

Ordered accordingly.

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MARY MARTIN, by Joseph Dean her next friend, *appellant*,
vs. NORRIS L. MARTIN, *respondent*.

Where real estate was purchased and paid for in part with the money or funds of the husband, and with his assent the conveyance was taken to a trustee who simultaneously gave a mortgage on the estate for the residue of the purchase money, and also with the husband's assent executed a declaration of trust to the effect that the premises were held to the sole and separate use of the wife, subject to the mortgage; *held*, the rights of creditors not being in question, that the declaration of trust was valid and binding upon the husband, and that the husband had no interest in such estate.

Where real estate of a wife which is held subject to the marital rights of her husband is sold, the proceeds of such sale, being money or personal property, belong to the husband, subject only to the equitable right of the wife to a support therefrom; and equity will not interpose in such a case in her favor, where suitable provision is otherwise made for her, or where she is living in a state of unjustifiable separation from her husband.

Accordingly, where the wife owned a dower interest in four-sixths of certain real estate of which her former husband died seized, and owned in fee the remaining two-sixths, and the husband and wife united in a sale, and out of the proceeds of such sale the sum of \$3000 was paid, without the husband's assent, upon a mortgage which encumbered the wife's separate estate; *held*, that the husband had a claim upon such separate estate to that extent.

But another sum of \$2000 out of such proceeds appearing to have been paid upon the same mortgage with the husband's unqualified assent; *held*, that such payment was a valid appropriation of that sum to the wife's separate use, and that in respect to it the husband had no claim upon the separate estate.

APPEAL from chancery. The bill in this cause was filed before the vice chancellor of the first circuit, by Mary Martin against her husband Norris L. Martin, and Samuel Richards her trustee. The assistant vice chancellor of that circuit, before whom the cause was heard on pleadings and proofs, made a decree which was modified by the chancellor on appeal to him. By one of the provisions of the decree as so modified, the husband was declared to have a lien upon the real estate which was the subject of the controversy, to the amount of \$5000 and interest thereon, which had been paid in two sums of \$2000 and \$3000, upon a mortgage encumbering the premises. Mrs

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Martin appealed to this court. The material facts are stated in the opinion of the court as delivered by WRIGHT, J.

D. D. Field, for the appellant.

H. B. Duryea, for the respondent.

WRIGHT, J. The bill in this cause was filed in the court of chancery to restrain the respondent from controlling or interfering in any way, with certain real estate alleged to be held in trust by one Samuel Richards, as the sole and exclusive property of Mrs. Martin, the appellant; also, to remove Richards from such trust, and to appoint a new trustee in his place under the sanction and authority of that court; with the further prayer that, in the mean time, a receiver of the rents, issues and profits of such real estate might be appointed, and such rents, issues and profits appropriated and paid to the now appellant. Richards was originally made a party defendant to the suit.

The case is one exclusively between husband and wife; for, although it is apparent from the evidence, that at the time of the purchase of the property which is the subject of controversy, and subsequently, the respondent was insolvent, no question affecting the rights of creditors arises. There are two principal and leading questions in the case. 1st. Is the subject matter of the controversy the separate and exclusive property of the appellant? 2d. What are the rights of the parties in the property arising from transactions subsequent to the creation of the alleged trust? When the bill was filed the appellant had left her husband, and was living separate from him; but the proof fails, although an apparently strenuous effort was made on that point, to establish such a case of cruel treatment by the husband, as, for that reason, to justify the separation, and to call for the particular interposition of the court of chancery in the appellant's behalf. Conduct, it is true, was shown, inconsistent with good manners or an affectionate regard for the feelings of a wife; but there was no proof of violence, or other

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manifestations of cruelty, rendering it unsafe for her to cohabit with him. The evidence fell short of what courts of equity have regarded as an excuse for a wife leaving her husband in disregard of her marriage vows. Still, it may be remarked, that although living apart from the respondent, no allegation was set up of unchasteness or immorality on the part of the appellant; nor any attempt made to impeach the purity of her character and morals.

The evidence shows that on the 9th of December, 1829, pursuant to an agreement fully understood by the parties to this suit, John Haggerty and wife conveyed the premises in question (being a farm on Long Island) to Samuel Richards. Mr. Haggerty testifies that both the parties (Mr. and Mrs. Martin) conducted the negotiation with him for the purchase of the farm, and he understood from both of them that it was purchased for her exclusive use and benefit, with her means, and that she might have a place as her home from which she might not be disturbed. The purchase money agreed to be paid was twelve thousand dollars. Of this sum, three thousand dollars was paid at the execution of the deed, by the transfer to and acceptance by Haggerty of a mortgage for that amount held by the respondent on certain Brooklyn lots; and the balance was secured by bond and mortgage of Richards upon the premises. Whether this sum of three thousand dollars was the proceeds of the property of the wife or the husband appears to have been made a question in the court below; but it was scarcely alluded to in the argument before us; and it is quite clear that in either view the rights of the parties would not be changed. The mortgage was transferred, and the payment made, by the act and consent of the husband; and if it were the absolute property of the husband, so long as creditors did not interfere, he had the right to settle it upon his wife for her sole and separate use.

Simultaneously with the execution of the deed from Haggerty to Richards, a declaration of trust was executed by Richards. This instrument recited that Richards, at the request of the appellant, had consented to become trustee of the lands con-

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veyed to him by Haggerty, and which conveyance from Haggerty was to be contemporaneous with it; that three thousand dollars of the trust moneys had been appropriated for the payment of so much of the purchase money of the land, and the residue, amounting to nine thousand dollars, was to be secured by bond and mortgage; that the appellant had required that a declaration of trust should be executed, and that the instrument had been drawn for such purpose. The trusts declared by the instrument were, 1st. To indemnify Richards, his heirs, executors and administrators, from and against the bond and mortgage executed by him for securing the balance of the purchase money, and all payments of principal and interest thereon; for the purpose of which indemnity, Richards, his heirs, executors, administrators and assigns, were empowered to sell the premises or any part thereof, or mortgage or demise the same, as he or they should think fit, and apply the proceeds thereof to such indemnity. 2d. Being kept indemnified, that Richards, his heirs and assigns, at the election, from time to time, of Mrs. Martin, and during her lifetime, should permit her and her family to occupy the premises, or receive the rents, issues and profits thereof, to her sole and separate use, to be paid on her sole and separate receipt, and to be accounted to her solely and separately, and to be free from the debts, contracts, and interference of her husband, present and future. 3d. Being indemnified as aforesaid, Richards, his heirs and assigns, should, upon the request in writing of Mrs. Martin, witnessed by one witness, convey unto such person or persons, and for such prices, and upon such terms as she should think fit, all and singular such premises, and give receipts and acquittances for the purchase money thereof, which should fully discharge the purchaser or purchasers for the price expressed therein to be paid by them. 4th. That on the death of Mrs. Martin, Richards, his heirs, executors and assigns, being indemnified, should convey the premises unto such person or persons, in such estates, and upon such uses and trusts, as Mrs. Martin should by writing in the nature of a will appoint, declare and direct; and in case no such instrument should exist at the time of her decease, then to convey

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the premises unto the heirs at law of Mrs. Martin, in the same shares, proportions, and estates, as if she had survived her husband.

About the time the purchase was made, and the declaration of trust given, the appellant went into the occupation of the premises, and, the proof shows, continued to principally manage and control them until 1838. The respondent, who appears to have been pursuing no regular employment or business, and who was evidently without means, except what should be derived from his wife's property, also resided upon the premises, and although he superintended the improvement of them, whilst she continued in their occupation, he uniformly treated them as the exclusive property of his wife, taking receipts for labor performed thereon in her name, and consulting her in relation to renting a portion of them. There can be no doubt, also, from the admissions of the respondent in his answer, and the evidence, that he understood fully the purport, contents and effect of the declaration of trust. He was in no respect deceived, as he was the principal actor in obtaining it. His object clearly then was, as he stated to Haggerty, to secure a home for his wife, by her means, (a great deal of which had already been wasted,) and thereby secure one for himself. The declaration of trust was in his hand-writing, and he presented it to Richards for execution. It was executed and acknowledged by Richards, and delivered to the respondent, not conditionally, or as an escrow, but absolutely for the use of the wife, in furtherance of the original design of the parties as stated to Haggerty. This was an effectual delivery to vest in Mrs. Martin the rights declared by the instrument, and to divest the respondent of any equitable title in the property. It is alleged in the answer, that the declaration of trust was, without the respondent's consent or knowledge, placed upon record; but whether it was or not, could not alter or affect the rights of Mrs. Martin acquired thereunder. It became operative from its execution by Richards and delivery to the husband for her use.

There is, therefore, no difficulty in determining the first question presented by the case. The subject matter of the

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controversy is, so far as the respondent is concerned, the sole and separate property of the appellant, and, as against him, she is entitled to the sole and exclusive use, and the rents, issues and profits thereof. Being indemnified against the principal and interest due or to become due on the mortgage given by him, it was the duty of the trustee to allow her to occupy the premises, or to receive exclusively the rents, issues and profits thereof, free from the debts, contracts or interference of her husband. The husband had no interest therein; and it is obvious that he did not design to have any that might be reached by creditors. Indeed, on the argument the ground was in effect abandoned that as between the parties to this litigation the trust was not a valid one, and the farm, prior to the payment of the sum of five thousand dollars on the mortgage given by Richards, the sole and separate property of the wife; for the entire argument of the counsel for the respondent related to his client's equitable rights in the property, growing out of transactions subsequent to the creation of the trust, and some three years after the appellant had entered into the use and occupation of the premises under it.

2. Do transactions subsequent to the creation of the trust give to the respondents any equitable rights in the property? This question is more difficult of solution than the first; and this difficulty mainly arises from the loose, imperfect and unsatisfactory manner in which the facts of the case are presented. We have a massive volume before us, the minutest proportion of which bears upon the question. Certain facts, however, are proved, and some others are admitted, that may enable us to arrive at a pretty satisfactory conclusion. It appears that in May, 1832, more than two years after the purchase of the property and the creation of the trust, and whilst Mr. and Mrs. Martin were living thereon, and paying semi-annually the interest on the mortgage of \$9000 given by Richards, and apparently using and enjoying the property without any control or intervention of the trustee, Edward G. Miller, a son of the appellant, paid to Haggerty, in two several payments, one of \$2000 and the other of \$3000, the sum of \$5000, in part pay

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ment of the bond and mortgage of \$9000 which Haggerty held on the property. It was admitted on the argument that this sum of \$5000 was realized from the sale of the appellant's interest in certain real estate in the city of New-York, formerly belonging to a deceased husband, which interest consisted of a dower right in four-sixths thereof, and a fee in the remaining two-sixths. That the respondent knew of the sale of this New-York property to Edward G. Miller, and that he made no demand on the latter for the proceeds prior or subsequent to the payment in 1832 to Haggerty, and that he knew of the payment about the time it was made, is quite apparent; for he was a party with his wife to a deed executed to Miller in 1830, for a part of the property, and from the fact of his ordinarily paying the interest as it fell due on the Haggerty mortgage, (which interest was payable semi-annually,) he must have known that the mortgage was reduced to \$4000, within six months at least after the payment had been made. In this interest of the appellant in the New-York property, the respondent Martin had a life estate subject to the equity of the wife for a sufficient settlement out of the dower fund, provided such settlement had not been made under the trust deed, or in some other way. At the time of the sale and the payment of this sum of \$5000 to Haggerty, the respondent was in law entitled to receive the income of such sum, and had he brought his action at law to maintain his marital rights, a court of chancery would not have interfered, unless he had deserted his wife, or neglected to provide for her, and the income of the dower fund was absolutely required for her maintenance and support. It is clear, then, that the proceeds of the interest of the appellant in the New-York property, could not be legally used to proportionably discharge an incumbrance on the wife's separate property, and thus divest the respondent of all interest therein without his acquiescence, or some agreement on his part to that effect. That he might acquiesce in, or agree to an appropriation which forever afterwards would estop him from setting up any claim growing out of his marital rights, is quite manifest.

The counsel for the appellant contends that the respondent

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agreed to the appropriation made by Miller of the \$5000 in part liquidation of the Haggerty mortgage; or, at least, that he acquiesced in such appropriation subsequently to its being made, which was equivalent to a previous agreement. His conduct certainly was unlike that of a person who contemplated setting up a claim to any part of the proceeds of the New-York property coming through his wife. He knew of the sale, and that the proceeds were in the hands of Miller, yet he suffered them to remain there, making no claim by virtue of his marital rights. He certainly knew of the appropriation shortly after it had been made, if he did not at the time, yet he made no objection to it. He never called on Miller for any explanation of the matter. He made no claim to the land on account of the payment. In 1834, two years after the payment, and when he must have known the precise state which the trust property was in, he accepted a deed of appointment from his wife of an estate for life in the premises, to commence at her death, in which deed the trusts showing that the property was held for her sole and separate use, were recited. Neither at the time this appointment was accepted, nor in his answer, did he make any claim to the proceeds of the appellant's interest in the New-York property, nor pretend that it was not agreed to be his wife's, and to be considered as a part of her separate estate. But it is urged, on the other hand, that he made no claim, or set on foot any proceedings to assert his rights in the estate derived from his wife, for the reason that he was in common with her, in the use and enjoyment of the farm on Long Island, and was always in the expectation of obtaining from her an appointment that would secure to him a jointure in it; and that if he is now compelled to relinquish the use and enjoyment of the premises, and be disappointed in his expectations of obtaining an interest therein, his acts ought not to be regarded as an acquiescence in the appropriation for such purposes. I think there is force in this argument in respect to \$3000, parcel of the sum realized from the appellant's real estate in the city of New-York; but none as to the additional \$2000 of that sum. The respondent admits in his answer, that at the time of the purchase of the

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Long Island farm, it was contemplated and agreed on his part, that the first payment on the Haggerty mortgage, which was the sum of \$2000, to become due in two years from the date of the purchase, should be made out of the proceeds of the appellant's interest in the New-York property, and that he so informed Richards at the time of the execution of the declaration of trust. He had therefore agreed, prior to the execution of the trust deed, which was to give to his wife the separate estate, that \$2000 of the proceeds of her property should go to proportionably discharge the purchase money, and with this agreement fully understood, and in view of its effectual consummation, the declaration of trust was executed and delivered to the respondent. I find it nowhere expressly alleged or set up in the answer, that this agreement was a conditional one, only to operate in the event of the respondent's obtaining an interest in the premises; and his subsequent acquiescence in the payment of the sum contemplated by the agreement, must be considered as an indication of an intention not to avoid it. About the period that the sum of \$2000 fell due on the Haggerty mortgage, it was paid, and it is to be inferred from the respondent's admissions and the facts proved in the case, with his assent. There would be no equity, therefore, as against the appellant, to revive a right in the respondent's behalf that he evidently assented to part with absolutely. But with regard to the further amount of \$3000 paid on the Haggerty mortgage before it fell due, there is no admission of the respondent of an assent or agreement on his part that the payment should be made from funds realized by a sale of the appellant's property. Indeed, it is expressly alleged in the answer of Martin, that the balance of the mortgage, after the first payment of \$2000 had been made, was to be paid by the respondent himself out of certain moneys expected to be received by him from the corporation of the city of Brooklyn. It is true that there was an apparent acquiescence of more than six years in the specific appropriation of the money by Miller; but this was, as has been urged, whilst the respondent was in the enjoyment of the property, and whilst he hoped and expected, by the act of the wife,

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to obtain a legal interest therein. Had the appellant immediately on the execution of the trust deed, strictly asserted her rights thereunder as against the respondent, and the latter had, for more than six years, quietly acquiesced in the appropriation of the \$3000 for the discharge of the mortgage, there would have been good reason for inferring an assent on his part to the appropriation for the absolute benefit of the wife; but I cannot arrive at the conclusion under the facts of this case, that the husband would at any time have consented that his whole marital interest in his wife's real estate in New-York, should go to the discharge of an incumbrance on her separate property, whilst he was excluded from any enjoyment thereof, or any expectation of an interest therein. To my mind the facts of the case do not present such a case of acquiescence in the appropriation of the \$3000, as to exclude the respondent from setting up any claim to an interest in that sum in the event of giving full effect to the declaration of trust.

The appellant now asks that effect may be given to that declaration; that the respondent may be restrained from interfering with the property; and the rents, issues and profits thereof may be appropriated and paid to her exclusively. The \$3000 has gone into the land; it is but just and equitable, therefore, that he should have a lien thereon to that extent, so as to entitle him to receive such sum, subject to the balance due upon the mortgage to Haggerty, which should be first paid. I should desire much to save for the appellant the whole of the interest in the Long Island farm, after the discharge of the mortgage. It appears that it is all that is left to her of a considerable fortune brought to a husband who is now insolvent. But it cannot be done consistently with a due regard for the rights of the respondent.

Several minor questions, affecting to some extent the rights of the respective parties, were raised during the progress of the case; but, coinciding fully with the views of the chancellor respecting them, I have intentionally refrained from their discussion.

I am of the opinion that the decree of the chancellor should

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be modified so as to strike therefrom the words "five thousand dollars," wherever they occur in such decree, and insert in lieu thereof the words "three thousand dollars."

Decree accordingly.

 HARVEY vs. OLMSTED.

Where, by a will made prior to the revised statutes, lands are devised in general terms without words of limitation or inheritance, the devisee takes a life estate only. And such introductory words as these—"I order and direct my real and personal estate to be divided and distributed as follows," do not enlarge the devise into a fee. A charge, to carry a fee by implication, where the devise is without words of limitation, *must be upon the person of the devisee in respect to the lands devised.* Where this exists, it gives to the devise the character of a purchase.

A testator, by his will made in 1821, gave a part of his real estate to his wife during her widowhood, and after her decease to two of his children. To his son Nathaniel he gave two parcels, one designated in the will as the Powers lot, the other as the *mountain lot*. To another son he gave a legacy of \$1000 to be paid out of his personal estate, if sufficient after paying debts and other legacies, but if not sufficient, then to be paid in land "from the Powers lot, so called." There were no words of inheritance in any part of the will. Introductory to all the devises and bequests were these words: "I order and direct my real and personal estate to be divided and distributed as follows." In the concluding part the testator declared, that in case any dispute should arise upon the will, the same should be referred to three men, to be chosen for that purpose, who should "declare their sense of the testator's intentions, unfettered by law and the niceties of legal construction." *Held*, that Nathaniel took only a life estate in the mountain lot.

EJECTMENT, brought in the supreme court by Anna Olmsted against Asa Harvey, to recover an undivided fourth of fifty acres of land known as the mountain lot, situated in the town of Austerlitz, county of Columbia. The cause was tried at the Columbia circuit, before WHITING, circuit judge, in October, 1846, when a verdict was directed for the plaintiff subject to the opinion of the supreme court on a case, with leave to turn the same into a bill of exceptions, containing the following facts:

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The plaintiff claimed as one of the children and heirs at law of Nathaniel Olmsted, sen. The defendant claimed as the grantee of Nathaniel Olmsted, jun., who died in 1835, and who claimed the premises under the will of Nathaniel Olmsted, sen. The question was whether a fee or only a life estate in the premises passed by that will.

Nathaniel Olmsted, sen. died in 1821, having first made his last will and testament, which, after directing the speedy payment of the testator's debts, proceeded as follows :

"Second. I order and direct that my real and personal estate be divided and distributed as hereinafter described, which is as follows, viz. : I give and bequeath unto my beloved wife, Sylvia Olmsted, the use and occupancy of the home farm (so called) containing about one hundred acres, with the buildings thereon, as also she, the said Sylvia Olmsted, to have the use and occupancy of the Bartlett lot (so called) which described lands as aforesaid, are to remain in the possession of the said Sylvia Olmsted, so long as she remains my widow, and no longer. But at the decease of the said Sylvia Olmsted, the above described lands and buildings, are to be equally divided between my sons Nathaniel Olmsted, jun. and Joseph Washburn Olmsted. I give and bequeath to my son, Nathaniel Olmsted, jun. the lot of land, that I purchased of Jacob Powers, containing fifty acres or more, and he the said Nathaniel to come into possession of the same immediately after my decease. *I also give and bequeath unto my son, Nathaniel Olmsted, jun. the mountain lot of land (so called,) containing about fifty acres, and the said Nathaniel to come into possession of the same immediately after my decease.*

"I give and bequeath to my son, Joseph Washburn Olmsted, one thousand dollars to be paid to him when he arrives to the age of twenty-one years ; the said thousand dollars to be paid out of my personal estate should there be a sufficiency left after the sums bequeathed hereafter to Anna Olmsted and Mary Olmsted. I give and bequeath to my daughter Anna Olmsted, two hundred dollars to be paid to her out of my personal property within one year from my decease.

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"I give and bequeath to my daughter Mary Olmsted, three hundred dollars to be paid out of my personal property in one year from my decease. I order and direct, that after my decease, and legal estimation shall be made of personal estate, if said personal estate (after deducting all my debts and the legacies to Anna Olmsted and Mary Olmsted as aforesaid,) shall not amount to the sum of one thousand dollars, being the sum by me bequeathed to Joseph Washburn Olmsted; then in that case the said Joseph Washburn Olmsted, shall be paid in lands from the Powers lot so called, to be appraised by my executors hereinafter named, so as to make to him the sum of one thousand dollars.

"And I do most sincerely and solemnly enjoin it upon my executors, hereinafter named, to see and take care that this my will be religiously fulfilled in all respects according to the true intent and meaning thereof. But in case any dispute should arise respecting any gift, bequest, matter or thing contained in this instrument, then in that case, the same shall be referred to three impartial and intelligent men of the town of Canaan, known for their honesty and integrity, each party choosing one, and those two choosing a third, which three men thus chosen shall, unfettered by law and the niceties of legal construction, declare their sense of the testator's intentions, and their decision to be binding on the parties, the same as would be in any court of record in the United States."

The personal estate of the testator, after paying his debts and the legacies to Anna and Mary Olmsted, was not sufficient to pay the legacy of \$1000 to Joseph Washburn Olmsted, there being a deficiency of \$609.69, which therefore according to the will became payable out of the fifty acres called in the will the Powers lot. Nathaniel Olmsted, jun. conveyed the *mountain lot*, the premises in question, to the defendant in 1826.

The supreme court gave judgment for the plaintiff, (*see 1 Barb. Sup. Court Rep.* 102,) and the defendant, having had a bill of exceptions duly signed and sealed, brings error to this court.

K. Miller, for the plaintiff in error. I. The testator having expressly ordered and directed that his real and personal

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estate should be divided and distributed as in and by his will was directed, passed a fee to the appellant's grantor in the premises. (*Jackson v. Merrill*, 6 *John*. 191; *Carr v. Jennerett*, 2 *McCord*, 66; *Morrison v. Semple*, 6 *Binn.* 94; *Hungerford v. Anderson*, 4 *Day*, 368; *Den, ex dem. Moor, v. Mellen*, 5 *T. R.* 562; *Watson v. Powell*, 3 *Call*, 306; *Brown v. Wood*, 17 *Mass. R.* 72; *For v. Phelps*, 20 *Wend.* 445.)

II. There are no words of perpetuity used in any part of the will, and no devise of any reversionary interest or estate. As the testator made no devise of any reversionary interest in any of the lands, it is evident he supposed he was devising all his real estate. (18 *Wend.* 207, *per Chancellor.*)

III. The devise to Nathaniel Olmsted, jun. and Joseph W. Olmsted, of the home farm and Bartlett lot after the decease of the widow, (who had a qualified life estate therein,) being a remainder interest, shows clearly that the testator intended that they should take a fee estate. (*Butler and wife v. Little*, 3 *Maine R.* 239; 2 *Prec. of Wills*, 291, 2; 6 *Bac. Abr.* 16, *C. Phil. ed.* of 1846; *Oatis v. Cook*, 3 *Burr.* 1688; 3 *Bing.* 3, 13; 1 *Ves. sen.* 491; *Gall v. Esdaile*, 8 *Bing.* 323; *Spraker v. Van Alstyne*, 18 *Wend.* 204.)

IV. The devise to Nathaniel Olmsted, jun. of the Powers and mountain lots passed a fee, as the Powers lot is expressly charged with the deficiency that should or might exist to pay the legacy of \$1000 to Joseph, after the application of his personal estate to his debts and other legacies; (which deficiency upon settlement was \$609.69.) (*Spraker v. Van Alstyne*, 18 *Wend.* 200; *per Chancellor*, 204; *per Senator Dickinson*, 209; *Cook and others v. Holmes and wife*, 11 *Mass. R.* 528; 8 *id.* 3; 1 *Munf.* 589; 6 *Binn.* 94.) The charge of the \$1000 legacy to Joseph was a direct charge upon the devisee of the estate specifically devised to him, so as to create a fee by implication. (*Doe v. Richards*, 3 *T. R.* 356; *Denn, ex dem. Moor, v. Mellen*, 5 *id.* 562; *Doe v. Allen*, 8 *id.* 499; *Jackson v. Bull*, 10 *John.* 153; *Heard v. Horton*, 1 *Denio*, 166.)

V. The estate given to Joseph, and which the executors were contingently authorized to set off and convey to him in

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satisfaction of his legacy, must be deemed to be a fee, and which raises an implication that the testator intended that Nathaniel should have the same estate. (*Cook, &c. v. Holmes*, 11 *Mass. R.* 528.)

VI. The whole tenor, and especially the concluding clauses of the will, show that the testator intended that a fee estate should pass to his two sons, and that he did not intend that in the disposition of his property his will or intention should be fettered by the niceties or technicalities of legal construction.

H. Hegeboom, for the defendant in error. I. The devise of the mountain lot, (which is the lot in question,) is wholly without words of inheritance, and is not aided by, or referred to in any other part of the will. Upon the well established principles of the common law, therefore, prevailing at the testator's death, the devise conferred simply a life estate. (*Dean v. Gaskin*, *Cowp. Rep.* 657; *Jackson v. Wells*, 9 *John.* 222; *Jackson v. Embler*, 14 *id.* 198; *Ferris v. Smith*, 17 *id.* 221.)

II. The introductory words in the will by which the testator orders and directs his real and personal estate to be divided and distributed as thereafter directed, do not necessarily convey a fee. (*Doe v. Buckner*, 6 *T. R.* 610; *Doe v. Wright*, 8 *id.* 64; *Doe v. Allen*, *id.* 497; *Denn v. Gaskin*, *Cowp.* 657; *Hogan v. Jackson*, *id.* 299; *Wright v. Russell*, *id.* 661; *Loveacres v. Blight*, *id.* 352; *Roe v. Vernon*, 5 *East*, 51; *Goodright v. Barron*, 11 *id.* 220; *Jackson v. Harris*, 8 *John.* 141; *Jackson v. Wells*, 9 *id.* 222; *Barheydt v. Barheydt*, 20 *Wend.* 576; *Wheaton v. Andross*, 23 *id.* 452; 2 *Taylor's Prec. of Wills*, 292.) Again, the phraseology expressly refers to the division afterwards spoken of, and is therefore limited by the subsequent words.

III. A fee by implication is not to be deduced from the estates given to the two sons being limited upon a previous life estate to the wife. (*Hay v. Earl of Coventry*, 3 *T. R.* 83; *Hackley v. Mawbry*, 3 *B. C. C.* 82; *Compton v. Compton*, 9 *East*, 267; *Doe v. Clark*, 5 *Bos. & Pull.* 343; *Doe v. Wright*, 8 *T. R.* 64; *Doe v. Clark*, 2 *N. R.* 343; *Ferris v. Smith*, 17 *John.*

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221; 2 *Powell on Devises*, 377.) Successive life estates were lawful and were frequently created upon the same property, when this will took effect. Again, this implication, if ever allowable, does not apply to the mountain lot.

IV. A fee by implication is negated by the description of the premises, or terms employed to designate them. The terms are "the mountain lot of land, *so called*," "the home farm, *so called*," "the Bartlett lot, *so called*," &c. conveying the idea that they were intended only to designate the premises, not the nature or extent of the testator's interest therein. (*Morrison v. Semplen*, *Binney*, 97; *Spraker v. Van Alstyne*, 13 *Wend.* 578.)

V. The words "to be equally divided between them," afford no just inference of an intent to pass a fee. (*Jackson v. Bull*, 10 *John.* 148; *Jackson v. Luqueer*, 5 *Cowen*, 221; *Spraker v. Van Alstyne*, 13 *Wend.* 582.) The use of these words is entirely consistent with the division of life estates; they refer probably to a territorial division. They do not go to the limitation of the estate. (*Jackson v. Luqueer*, 5 *Cowen*, 221.) They do not affect the mountain lot.

VI. The charge upon the Powers lot does not raise a fee by implication. To raise a fee by implication, the legacy must be charged upon the *person* of the devisee. (*Jackson v. Bull*, 10 *John.* 143; *Jackson v. Martin*, 18 *id.* 31; *Jackson v. Harris*, 8 *id.* 141; *Spraker v. Spraker*, 18 *Wend.* 200; *Barheydt v. Barheydt*, 20 *id.* 576; *Wheaton v. Andross*, 23 *id.* 452; *Doe v. Clark*, 5 *Bos. & Pull.* 343; *Fox v. Phelps*, 17 *Wend.* 393; *Burlingham v. Belding*, 21 *id.* 463.) When the charge or annuity is to be paid out of the lands merely without saying *by whom*, the devisee's estate will not be enlarged. (8 *East*, 141; 8 *Petersd.* 165.) To raise a fee by implication, the charge must also be *absolute* and *not contingent*. (*Merson v. Blackmore*, 2 *Atk.* 341; *Doe v. Allen*, 8 *T. R.* 497; *Jackson v. Harris*, 8 *John.* 141; *Spraker v. Spraker*, 18 *Wend.* 200; *Spraker v. Van Alstyne*, 13 *id.* 578; *Denn v. Mellor*, 5 *T. R.* 558; *Jackson v. Bull*, 10 *John.* 148.) The legacy to Joseph is not necessarily payable out of the estate, devised to Nathaniel, jun.

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It may be paid out of the land from the Powers lot without touching the life estate of Nathaniel therein. (*Barheydt v. Barheydt*, 20 *Wend.* 576.) Indeed the payment of the deficiency to Nathaniel was not necessarily *in land* at all; it may properly be by the *avails of the sale*. (*Jackson v. Burr*, 9 *John.* 104.) The implication of a fee, (if there be one,) is confined to the Powers lot. It does not extend to the mountain lot. The provisions of the will confine it to the Powers lot; and the books are full of cases showing the impropriety of thus raising an implication upon an implication. (*Spraker v. Spraker*, 18 *Wend.* 200; *Spraker v. Van Alstyne*, 13 *id.* 578.)

VII. The absence of words of perpetuity or of the devise of any reversionary interest, furnish no sound or legitimate legal presumption of an intent to devise the whole estate. (*Wheaton v. Andross*, 23 *Wend.* 452.) To indulge such presumption would be to subvert the unbroken line of English and American decisions, which allow only a life estate, in the absence of words of perpetuity.

GARDINER, J. According to the terms of the devise, Nathaniel Olmsted, sen., took a life estate only in the mountain lot. Such was the established construction, at the making of this will, of a devise of real estate containing no words of limitation. (6 *Term Rep.* 610; 2 *Preston on Estates*, 188; 20 *Wend.* 580.) It is a familiar proposition that a testator is always presumed to use the words in which he expresses himself according to their strict and primary acceptance, unless from the context of the will it appears that he has used them in a different sense. (*Wigram on Wills*, *Law Lib.* vol. 2, p. 11.) The words of this devise, as we have said, import an intent of the testator to grant a life estate only in the premises in question, but it is claimed that the context enlarges the estate to a fee, by showing that such must have been the intention of the testator.

We are referred to the second clause by which the testator "orders and directs that his real and personal estate be divided and distributed as follows." This clause is obviously introduc-

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tory to the actual distribution afterwards made by the decedent. It indicates an intention to dispose of his property, real and personal. But this is not enough. There must be an intent and words of disposition. Both must concur in every valid devise. (*Saunderson v. Dobson*, decided in 1847, in *Exch. Law Jour.* 249; *Doe v. Earle*, *id.* 242.) The clause cannot embrace all the subsequent devises of real property, because a portion is devised to the wife of the testator during her widowhood.

Nor are the introductory words necessarily connected with the disposition of other portions of his real estate to his sons. The estate of the testator in his real property was as much the subject of division as the lands themselves. If he had given a particular tract or farm to one of his sons, and made no disposition of the residue, it would not be pretended that we could extend the gift to other lands, however emphatically the testator should announce his intention to settle all his property by his will. This remark is applicable to the devise in question.

The testator has used language which, according to an unbroken series of decisions, import an intent to give an estate for life. Such is his disposition. To use the language of the introductory clause, he has "divided and distributed" such an interest, and no other, to each of his sons. If the residue of his estate is undisposed of, it presents the ordinary case of a general intention not executed. But it furnishes no reason for departing from the language of the testator, nor any authority to this court in his place to distribute his property for him. (*Barheydt v. Barheydt*, 20 *Wend.* 580, 581.)

There is no foundation for saying that Nathaniel took a fee in consequence of the legacy of \$1000 being a charge upon him in respect to the lands devised to him by the testator. A charge to create a fee by implication, must be upon the person of the devisee in respect of the lands devised. Where it exists, it takes from the devise the character of a gift, and turns it into a purchase. The mode of compensation prescribed by the testator, may be by the payment of debts or legacies, or by the relinquishment of a right. To guard the devisee under such circumstances against loss, according to the presumed intent of

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the testator, the estate is turned into a fee. (*Spraker v. Van Alstyne*, 18 *Wend.* 205, and cases cited; *Jackson v. Ball*, 10 *John.* 143; 20 *Wend.* 581.) In this case the legacy to Joseph W. Olmsted is made a charge upon the personal estate, and that failing, upon the Powers lot. At most the charge upon this land is contingent. There is no obligation imposed upon Nathaniel in respect of the devise to him of the mountain lot; on the contrary, in default of personal property, the legacy is to be paid in land other than the premises in question, to be appraised by the executors. (20 *Wend.* 582, and cases cited; 8 *John. R.* 142; 18 *Wend.* 205, and cases cited.) We think, therefore, that the decision of the supreme court should be affirmed.

Judgment affirmed.

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A remainder in fee limited by will to the eldest son of the first taker to whom an intermediate life estate is given, is contingent until the birth of such son; but on the happening of that event, before the termination of the life estate it becomes a vested estate in remainder.

And where an estate tail in remainder was so limited, and became vested by the birth of a son prior to the act of 1786, abolishing entails; held, that by the operation of that act, the estate tail in remainder was converted into a fee simple in remainder, which, on the death of the remainderman without issue in 1809, and before the termination of the intermediate life estate, descended to his father as his heir at law.

One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, where the estate was acquired by purchase, as will constitute him a *seignior* or stock of descent.

ON error from the supreme court, where the action was ejectment, and the verdict and judgment were in favor of the defendant. For a full statement of the case, together with the arguments of the counsel and the opinion of the supreme court, see the report of the case in that court, 2 *Denio*, 9.

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S. Stevens, for the plaintiff in error.

D. Buel, Jr. & J. Pierson, for the defendant in error.

BRONSON, J. This case, and the case of *Van Rensselaer v. Poucher*, which is also before us, involving the same question, have been so fully and ably examined by the learned judge who delivered the opinions of the supreme court, that I shall not go very fully into the discussion of the principle to be settled.

I shall assume, without however intending to intimate any opinion on the point, that the plaintiff is right in saying, that the trustees took the legal estate for the life of Mathias, the grandson of the testator; and that he had only an equitable life estate.

It was not suggested, nor am I aware that the act to abolish entails, passed in 1782, can have any material influence upon the case, and I shall therefore leave it entirely out of view.

Dirk, the oldest son of Mathias the grandson of the testator, was born in 1783, and died in 1809; both events having happened while the life estate was running, which did not terminate until 1825. On the birth of Dirk, his remainder, which was before contingent, became vested in interest, and he was seized of an estate tail in remainder. Although he neither had possession, nor the right to immediate possession, he had a fixed right of future enjoyment the moment the life estate should come to an end. Such was the state of the case at the time the act of 1786 was passed; and the question is, whether the act took effect upon an estate tail, under such circumstances, as well as upon an estate tail where the tenant in tail was seized in fact, or had actual possession. I think it did.

When the legislature was about to abrogate the right of primogeniture, and make other reforms in the law of descents, they found estates tail standing in the way of the new rules which they proposed to establish; and they began the work by abolishing those estates. They did not however annihilate the title to the property, but only changed the nature or quality of the estate, so that it would go to the heirs general of the

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tenant in tail, instead of the particular heirs designated by the donor. This was, I think, the leading object which the legislature had in view, though the provision which they made served the further purpose of getting rid of the necessity for fines and recoveries as a means of docking the entail. The estate tail was turned into a fee simple. Then the tenant in tail, having by force of the statute become tenant in fee simple, and having acquired the estate by purchase, would constitute a new stock of descent, from whom the lands might go according to the law of descents, instead of following the form of the gift in tail.

There was the same reason for attacking the estate tail when the tenant in tail was only seized in law, as there was when he was seized in fact; and there was no stronger reason against doing it in the one case, than there was in the other. And on looking at the statute it will be seen that the legislature did not deal with the subject by the halves, but made clean work of it. The title is "an act to *abolish entails*, to confirm conveyances by tenants in tail, to *regulate descents*," &c.; and the first words of the first section are, "that all estates tail shall be, and are hereby abolished." This sweeping declaration was made by men who well understood the force of language, and the nature of the subject with which they had to deal; and it can indicate nothing less than the purpose of reaching all estates tail, without exception. They were acting in accordance with the spirit of the times; and there was no reason in the nature of things why they should not cover the whole ground. Whatever room for doubt there might have been about the true construction of the remaining part of the section, had it stood alone, that doubt must be removed by the language with which the section begins. That furnishes a key to the intention of the framers of the law which cannot be mistaken. If we omit some words which are not material to the present inquiry, and look only at that branch of the section which relates to estates tail then existing, the provision is, "that all estates tail shall be, and are hereby abolished; and that in all cases where any person now is seized in fee tail of any lands, tenements or here

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ditaments, such person shall be deemed to be seized of the same in fee simple absolute." (3 R. S. App. 48.) The same broad language with which the section begins is continued through the clause. It is a provision concerning "all estates tail," and "all cases" where a person is seized of such an estate; and I cannot doubt that the legislature intended to dispose of the whole subject. They meant to reach an estate tail in remainder, as well as one in possession.

It is true that the statute speaks of a person seized of *lands, tenements or hereditaments*; and, in general, seisin of lands means actual possession of them. But taken in their connection, the words evidently mean, seisin of an *estate* in lands. The legislature began by speaking of *estates* tail: that was the subject in hand: those estates were to be turned into estates of a different tenure or quality; and the lawmakers must be understood as speaking of the same thing in the latter part of the clause which they had mentioned at the first. As I read the statute the provision is, that all *estates* tail shall be abolished; and where any person now is seized of *an estate* in fee tail in any lands, &c. such person shall be deemed to be seized of the same, (to wit, an estate in the lands) in fee simple. The third section, which regulates descents, like the first, which abolishes entails, speaks of a person seized of lands, tenements or hereditaments; and I think the word "seized" was used in the same sense in both sections. One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, when the estate was acquired by purchase, as will constitute him a *stirps* or stock of descent under the third section; and the person who has a vested remainder in fee tail, acquired in the same way, has such a seisin in law as brings his case within the operation of the first section. His remainder in fee tail is turned into a remainder in fee simple. The first section brings the case under the influence of the third; and the estate no longer follows the will of the donor, but is governed by the general law of descents.

Some stress has been laid on the word "fee." As Dirk was

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not entitled to the possession so long as the life estate continued, and consequently had not the entire interest, it is said that he had no fee, and that his interest could not be turned into a fee simple. This argument assumes that the legislature employed the words "fee tail" and "fee simple" to measure the *quantum* of estate: but I think the words were used to mark the kind or quality, rather than the quantity of the estate. The word "fee" was originally used in contradistinction to *allodium*, and signified that which was held of another, on condition of rendering him service. It related to the quality, and not the quantity of the estate. And although the word is now generally employed to express the *quantum* of estate, that is not its only meaning. In framing this law, the legislature was not concerned about the right to present enjoyment, but was regulating the course which the estate should take in future. The purpose was, to impress a new character or quality upon the estate, so that it would no longer follow the will of the donor, but the law of descents; and to that end, the estate in fee tail was converted into an estate in fee simple.

If this had been such a case as was put by way of argument by the counsel for the plaintiff in error in *Van Rensselaer v. Poucher*, to wit, if Dirk had been old enough for that purpose, and had died, leaving a son, before the act was passed, then, as the son would take by descent, he would not have such a seisin as would enable him to transmit the estate by descent, before he had exercised some act of ownership over it which the law would regard as equivalent to actual seisin; and it may be that his estate tail would not have changed its character until the determination of the life estate. Assuming such to be the law, it only proves that there might by possibility have been a case, though the thing was improbable, where the statute would not have had an immediate effect upon the estate tail. It proves nothing against giving full scope to the broad language and obvious policy of the statute, so far as it can be done consistently with the rules of law; and it may be done in this case. Dirk took the estate *per formam doni* from the testator, and not by descent from his father Mathias. He took as a purchaser, and

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had a sufficient seizin to cast a descent. There was no good reason why the statute should not have immediate operation upon his estate, as well as upon estates in possession; and I think his remainder in fee tail was converted into a remainder in fee simple.

It is proper to add, that after this judgment had been rendered, and a majority of the judges of the supreme court had been changed, the question came again before that court in *Van Rensselaer v. Poucher*, and upon full consideration was again decided the same way. And a like decision was made in May, 1846, by the circuit court of the United States for the southern district of this state, in the case of *Van Rensselaer v. Kearney and others*. I have the authority of both the learned judges of that court for saying, that the decision of the supreme court was not treated as a controlling authority; but the question was examined and decided in conformity to the opinion which the judges of the circuit court entertained of the law applicable to the case.

The question is certainly not free from difficulty; but upon the best consideration which I have been able to give to it, I am of opinion that the judgment of the supreme court is right; and such is the opinion of the court.

Judgment affirmed.

BUTLER and VOSBURGH vs. MILLER.

It seems, that the question of fraud in a personal mortgage should be submitted to the jury, although no change of possession accompanies the mortgage; and the verdict of the jury in favor of the *bona fides* of the transaction will be as conclusive as upon any other question of fact.

A judgment confessed by the mortgagor to the mortgagee for the same debt secured by a personal mortgage, does not merge or extinguish the mortgage, where by agreement the judgment is taken as collateral merely.

And even where there is no agreement that the judgment shall be held as collateral, *quere*, whether a judgment for the debt can work an extinguishment of the mort-

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gage. The case of *Butler and Vosburgh v. Miller*, (1 *Denio*, 407,) referred to and questioned in this particular.

But where execution upon a judgment confessed for the mortgage debt was issued, and levied upon the chattels mortgaged, which were advertised for sale thereunder, and after the same property was sold upon another execution against the mortgagor, the mortgagees moved the supreme court for an order directing the sheriff to apply the proceeds of the sale upon their execution; held, in an action of trover by the mortgagees against the sheriff who made the sale, that these acts were repugnant to any claim under the mortgage, and precluded the plaintiffs from so claiming the property.

It seems, that a personal mortgage transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by the performance of the condition.

THIS was an action of trover brought in the supreme court by Butler and Vosburgh against Miller, for a number of horses, cattle and hogs, and a quantity of farming utensils, and other property. The cause was first tried before CUSHMAN, late circuit judge, at the Columbia circuit, in September, 1843, when a verdict was had for the plaintiffs, which was set aside by the supreme court and a new trial ordered. (See 1 *Denio*, 407.) A second trial was had before PARKER, circuit judge, in March, 1846, and on that trial the case was as follows:

The plaintiffs gave in evidence a chattel mortgage upon the property in question, executed to them by one Abraham B. Vanderpoel, dated April 19, 1842, which had been duly filed in the proper town clerk's office. The instrument recited that Vanderpoel was indebted to the plaintiffs in the sum of \$498,72, being the amount of three promissory notes made by Vanderpoel, and held by the plaintiffs, and the mortgage was to become void if Vanderpoel should pay the debt by the first day of October then next. Evidence was given tending to show a just consideration for the notes. At the time the mortgage was given the property was on the farm of the mortgagor, and was used by one Mosher, who worked the farm on shares, under an agreement by which Vanderpoel was to furnish teams, stock and utensils. After the mortgage was given the property remained on the farm, and was used as before. On the 15th day of July, 1842, the defendant, as sheriff of the county of Columbia, sold the property in question by virtue of an execu-

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tion against Vanderpoel, in favor of the Lafayette Bank, which was delivered to the sheriff on the 5th of May, 1842. The evidence tended to show that the plaintiffs asserted their claim under the mortgage at the sale, and forbid the sale.

It also appeared that on the 7th of May, 1842, the plaintiffs took from Vanderpoel a bond and warrant of attorney for the amount of the notes secured by the mortgage, upon which judgment was entered in the supreme court on the same day, and execution thereon was, by Vanderpoel's consent, issued immediately to one of the deputies of the sheriff aforesaid. It was also proved, after objection duly made and exception by the defendant's counsel, that it was agreed between the plaintiffs and Vanderpoel that the judgment should be taken as *collateral to the mortgage*. The plaintiffs' execution, soon after it was issued, was levied upon the property in question, and the property was advertised for sale both under that execution and the one above mentioned in favor of the Lafayette Bank.

It also appeared that after the sheriff's sale above mentioned, the plaintiffs made a motion in the supreme court for an order requiring the defendant, as such sheriff, to apply the proceeds of the sale on the judgment and execution in their favor. This motion was based upon an allegation that the execution of the Lafayette Bank, when first delivered to the sheriff, was directed to the sheriff of the county of *Hudson*, (there being in fact no such county,) and that the error was corrected and the execution redelivered to the sheriff *after* the execution of the plaintiffs was issued. The motion was denied with costs.

The defendant's counsel requested the circuit judge to decide and charge the jury, 1. That the mortgage under which the plaintiffs claimed was fraudulent and void as against the judgment and execution of the Lafayette Bank. 2. That the judgment taken by the plaintiffs on the 7th of May, 1842, for the same notes secured by the mortgage, merged the notes and extinguished the lien of the mortgage. 3. That the issuing of execution upon that judgment, the levy upon the mortgaged property, and the motion to the supreme court to have the proceeds of the sheriff's sale applied upon that execution, were

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severally acts inconsistent with any claim under the mortgage, and destroyed all right to assert any such claim. The circuit judge ruled, that the question of fraud was one of fact for the jury to decide. That the judgment was not a merger or extinguishment of the mortgage, if it was taken as collateral merely; if not so taken, then that it was a merger. Upon the 3d proposition he refused to charge as requested. The defendant excepted, and the jury gave their verdict for the plaintiffs. The defendant moved in the supreme court for a new trial on bill of exceptions, which was granted by that court. The plaintiffs appealed to this court under the judiciary act of December, 1847.

K. Miller, for the defendant.

J. H. Reynolds, for the plaintiffs.

JOHNSON, J. The question of the *bona fides* of the mortgage was properly submitted to the jury, and their verdict in favor of the honesty and fairness of the transaction is conclusive according to all the cases since *Smith v. Acker*, (23 Wend. 653.)

The circuit judge was requested to charge the jury that the subsequent judgment on the notes operated as a merger of the notes and consequently avoided the mortgage. The judge, however, charged that the judgment did operate as a merger of the notes and mortgage unless it was satisfactorily shown that the judgment was taken as collateral to the mortgage, in which case it was not a merger.

The charge upon this point was in strict accordance with the rule laid down by the supreme court, (1 Denio, 407,) when this cause was before it on a former trial, and must be regarded as correct unless that court was then in error as to the true rule upon the subject.

It may perhaps well be doubted whether the judgment was a security of a higher nature than the personal mortgage; and even if it were, whether it would operate to extinguish the mortgage and divest the mortgagees of the title they had ac-

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quired under it. It will scarcely be contended that in case the notes in question had been secured by a mortgage upon real estate, a judgment upon them would have extinguished such mortgage. And yet a mortgage upon real estate is a mere security and incumbrance upon the land and gives the mortgagee no title or estate therein whatever. Whereas a personal mortgage is more than a mere security. It is a sale of the thing mortgaged and operates as a transfer of the whole legal title to the mortgagee, subject only to be defeated by the full performance of the condition. And if it be conceded that a judgment upon the original indebtedness would not extinguish a collateral security for its payment upon real estate, I do not see how it could divest a title to personal property acquired by purchase. A vested legal title, whether in real or personal property, is the highest of all securities—certainly higher than the mere lien of a judgment upon land, or the right of a plaintiff to personal property acquired by levy under an execution.

Although it is clear that the notes were merged in the judgment by operation of law, it does not, as I think, certainly follow that all the collateral securities would be extinguished. The debt is not yet satisfied. The notes may have been cancelled, but the debt was not, and until that is done it seems to me that all mere collateral securities, whether upon real or personal property, should be allowed to stand; especially titles to property acquired under instruments where the parties stand in the relation of vendor and purchaser without fraud. The rule that security of a higher nature extinguishes inferior securities will be found, I apprehend, only to apply to the state or condition of the debt itself, and means no more than this—that when an account is settled by a note, a note changed to a bond, or a judgment taken upon either, the debt as to its original or inferior condition is extinguished or swallowed up in the higher security; and that all the memorandums or securities by which such inferior condition was evidenced lose their vitality. It has never been applied, and I think never should be, to the extinguishment of distinct collat-

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eral securities, whether superior or inferior in degree. These are to be cancelled by satisfaction of the debt or voluntary surrender alone. This most obvious and rational distinction seems to have been overlooked by the supreme court in the opinion to which I have referred.

It is unnecessary, however, to decide the question here discussed, as it was put to the jury substantially to find whether it was agreed or intended by the parties in entering up the judgment to cancel the mortgage; and I admit that if such had been the agreement and intention, there was sufficient consideration to support it, and that the mortgage must have yielded to the superior force of the agreement, whether express or implied.

The jury have determined by their verdict that the parties to the mortgage did not intend to cancel it, and that notwithstanding the judgment, it remained a valid subsisting security.

Thus far then it seems to be established by the verdict, that at least up to the time of the execution being placed in the hands of the sheriff by the plaintiffs, the mortgage was a valid instrument in their hands, and vested in them the legal title to all the property it purported to convey, subject to be defeated only by payment and satisfaction, or voluntary waiver or surrender.

It remains to be seen whether the plaintiffs have in any way divested themselves of their title to the property thus acquired, or been guilty of any acts which would authorize the court to estop them from asserting their rights under the mortgage.

If this was a mere question as to whether a party might pursue one of several remedies or collateral securities to any extent short of actual satisfaction without prejudice to the others, no one I apprehend could entertain any doubt. But that is not the question. The precise question here is whether the plaintiffs in pursuing their remedy under the judgment have not so treated and dealt with the property in question as to preclude themselves from setting up their title or claim to it under the mortgage. At the time the plaintiffs' execution was issued the sheriff as against them had no right to seize the property and

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sell it as Vanderpoel's without first paying their mortgage, and could acquire no such right except through their assent express or implied. And when they voluntarily placed their execution in the hands of Reynolds, the deputy, with directions to him to levy upon this property and sell it, they certainly to that extent unequivocally consented to its being treated as Vanderpoel's. And had they afterwards stood by and suffered it to be sold without objection, they would have been estopped forever from asserting their title or claim under the mortgage. (*Cowen & Hill's Notes*, 200, 201, 203.)

It seems to me, however, that at any time before sale or before any third person was placed by means of such assent in a situation to be thereby prejudiced, it was clearly revocable. (*Id. and cases there cited*; *Wallis v. Truesdell*, 6 *Pick. Rep.* 455; *Uffred v. Lucas*, 2 *Hawks*, 214.) It can make no difference, that I can perceive, that the party to whom such consent or permission is given is a public officer whose custody of the goods is the custody of the law, and who is to make a title to third persons by sale under legal process. The right to make or convey a title at all, where the defendant in the execution is not the true owner of the property, must rest upon the assent either express or implied of the person who has the real title, and if that assent may be withdrawn by him and his own title asserted at any time before the right of selling it as the property of the defendant in the execution has been exercised by the officer, a sale afterwards would be as unauthorized and tortious as though no such assent had ever been given. The rights of the plaintiffs in the execution first in the hands of the sheriff had not as yet been prejudiced or in any manner affected. They were as perfect after the plaintiffs in this suit had forbid the sale, unless their mortgage was first satisfied, as they were before the latter execution was placed in the sheriff's hands. Nor could the defendant or those whose interests he represents complain that they had been misled or suffered to act in ignorance of the plaintiffs' claims. They had notice in season to put them upon inquiry, and proceeded afterwards at their peril.

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If the grounds I have assumed are correct, that the authority to the defendant to dispose of the property as that of Vanderpoel, given by the plaintiffs, when they placed their execution in his hands, was revocable, and that they did revoke it before the sale and in time to preserve their rights under the mortgage, it follows that they ought to recover unless it can be made to appear that their application for the money in the hands of the sheriff, subsequent to the sale, was an effectual waiver or relinquishment of the claim asserted by them before the commencement of the sale, and a ratification of the sale, notwithstanding the dissent at the time.

But how stands the case here? Having placed themselves in a situation to vindicate their rights as owners under the mortgage, have not the plaintiffs by their subsequent acts entirely abandoned the ground assumed at the opening of the sale, and returned to the one they elected to occupy when they directed the sheriff to levy upon and sell the property as Vanderpoel's by virtue of their execution? The bill of exceptions shows that one of the plaintiffs bid off a portion of the property at the sale, and in pursuance of some prior arrangement by which a credit was to be given to enable the parties to get a decision of the supreme court upon their conflicting claims for the proceeds of the sale, gave his note to the sheriff at ninety days for the amount of his bid. And after the sale, according to their affidavit, and while the money was in the hands of the sheriff's deputy, they insisted that he should first satisfy their execution still in his hands by applying the money thereon. This the sheriff refused to do. And upon this refusal the plaintiffs, on an affidavit and notice to the plaintiff's attorney in the other execution, moved the supreme court to have the avails of the sale applied to the satisfaction of their execution in the first instance. The affidavit upon which they founded their motion contains no intimation that the sale was not with their assent and for their benefit. Indeed the application could proceed upon no other conceivable idea than that of their execution continuing in the hands of the officer as a valid process binding upon the property held by him and entitled to satisfaction from the proceeds of the sale

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It implies the full and unequivocal concession that Vanderpoel was the owner of the property, and that the moneys growing out of the sale belonged to his creditors having executions in the sheriff's hands at the time of the sale. It can make no difference that I can perceive in principle that their application was denied and their debt remains unsatisfied.

Having abandoned the grounds they assumed at the opening of the sale, and elected to treat the sale as a legal and valid transfer of the property to the purchasers, and asserted their rights as creditors of Vanderpoel to the proceeds of the sale by virtue of their execution, and afterwards compelled the other claimants to come into court and litigate their claim to the same; they must rest content although judgment passed against them. They are adjudged to stand in the same situation as though they had interposed no objection from the beginning, but had acquiesced throughout in the proceedings of the sheriff. It was said upon the argument that the supreme court in deciding the question upon the motion, held that the plaintiffs were estopped from claiming the moneys arising from the sale, and sent them back to the rights asserted by them under their mortgage. But no such question is presented by the bill of exceptions, or was before the circuit judge, and cannot be raised and passed upon in this court.

I am of opinion, therefore, that the circuit judge erred in his refusal to charge the jury as requested by the defendant in regard to the plaintiffs' proceedings to obtain the money after the sale, and that a new trial should be granted.

New trial granted.

Ruckman v. Cowell.

RUCKMAN vs. COWELL.

Where the form of the pleadings is such that a party has had no opportunity of setting up fraud in avoidance of a bankrupt's discharge, he may give the fraud in evidence on the trial without having pleaded it.

Accordingly, where a party who was sued in trespass for taking goods, pleaded not guilty and gave notice of justification under a judgment and execution against the plaintiff, and on the trial the plaintiff proved his discharge as a bankrupt obtained after the judgment was rendered; *held*, that the defendant might give fraud in evidence so as to avoid the discharge.

In pleading a bankrupt's discharge, the facts on which jurisdiction depends must be averred; but when the discharge is offered in evidence, jurisdiction will be presumed until the contrary appears. *Per BRONSON J.*

The circuit and district courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. *Per BRONSON, J.*

A valid discharge in bankruptcy extinguishes a judgment, so that the creditor who seizes the bankrupt's goods by virtue of the judgment and execution thereon, may be charged as a trespasser, even if he have no knowledge of the discharge. *Per BRONSON, J.*

But otherwise as to the officer making the levy. He is protected by the process regular on its face.

ERROR from the supreme court, where Cowell sued Ruckman in *trespass de bonis, &c.* The cause was tried at the Albany circuit in October, 1844, before PARKER, circuit judge, and a verdict had for the plaintiff. The defendant moved in the supreme court for a new trial on a bill of exceptions, which motion was denied by that court and judgment rendered for the plaintiff. The facts are sufficiently stated in the opinion of BRONSON, J.

S. Stevens, for the plaintiff in error.

H. G. Wheaton, for the defendant in error.

BRONSON, J. The case may be stated in few words. Cowell brought an action of trespass *de bonis asportatis* against Ruckman in the supreme court; the defendant pleaded not guilty, and gave notice of justification under a judgment and execu

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tion in his favor, against the plaintiff. On the trial, the plaintiff proved the taking of the goods by the sheriff of New-York upon an execution in favor of the defendant against the plaintiff; and there rested his cause. The defendant then gave in evidence the *feri facias* under which the sheriff acted, and the judgment on which the execution issued. The judgment was recovered on the 8th day of February, 1841, upon two promissory notes made by the plaintiff in 1840. The plaintiff then offered in evidence his discharge as a voluntary bankrupt under the act of 1841, granted by the district court of the United States for the northern district of New-York on the 25th day of July, 1842. The defendant objected to the admission of this evidence on several grounds: 1. The evidence was immaterial, and if admitted, would not subject the defendant to an action of trespass for taking the property; 2. The plaintiff must show that the district court acquired jurisdiction to grant the discharge; and 3. The act of congress under which the discharge was granted was unconstitutional and void. The court overruled all of these objections, and the discharge was given in evidence. It purported to have been granted on the petition of the bankrupt. The defendant then offered evidence to prove that the plaintiff had been guilty of such acts of fraud as would, by the bankrupt act, avoid the discharge. This evidence was rejected by the court, on the ground that the defendant had not given the plaintiff notice of the frauds which he proposed to prove. The defendant excepted to this, and the other decisions of the court; and verdict and judgment having passed for the plaintiff, the defendant now brings error.

1. If the discharge was valid, it extinguished the judgment; and the defendant was a trespasser for afterwards acting under it. As the execution was regular upon its face, and issued from a court of competent jurisdiction, it was a protection to the officer who made the levy; but it could not justify the party at whose instance it was issued. He acted at his peril. It is true that he may have been ignorant of the discharge; but that was his misfortune. Having seized the goods without authority, it

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was a trespass for which he must answer, however innocent he may have been of any intention to do an illegal act.

2. In pleading a bankrupt's discharge it has been held necessary to show that the court had jurisdiction to grant it, by averring the existence of the facts on which jurisdiction depended. (*Sackett v. Andross*, 5 *Hill*, 327; *Stephens v. Ely*, 6 *id.* 607. And see *Morgan v. Dyer*, 10 *John*. 161; *Jenks v. Stebbins*, 11 *id.* 224.) But when the discharge is given in evidence, jurisdiction to grant it should be presumed until the contrary appears. It would be otherwise if the discharge were granted by a commissioner, or a court of strictly inferior jurisdiction. But the district and circuit courts of the U. States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. If jurisdiction do not appear upon the proceedings, their judgments and decrees will be reversed on error or appeal. But they are not nullities, which may be disregarded in a collateral proceeding. (*McCormick v. Sullivant*, 10 *Wheat.* 192.) In this respect the district and circuit courts of the United States stand on the same footing as courts of general jurisdiction; and the authority of such courts is always to be presumed, until the contrary is shown. It is true that the bankrupt act does not, in terms, give any effect to the discharge except "when *duly* granted." (§ 4.) But the law presumes that it was duly granted, until the contrary appears.

3. The rejection of the evidence to impeach the discharge for fraud was, I think, clearly wrong. True, the 4th section of the bankrupt act says, in effect, that the discharge may be impeached for fraud *on prior reasonable notice* specifying in writing such fraud. But that means no more than that notice shall be given where the case is such that the fraud may be pleaded; and not that the creditor must plead the fraud at his peril where, as in this case, he had no opportunity to do it. If the debtor, on being sued, pleads his discharge, the creditor must reply the fraud, or he will not be allowed to prove it on the trial. But that rule cannot apply where, as in this case, the discharge is given in evidence without having been pleaded, and consequently where the creditor could not plead the fraud

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If there had been negative words in the statute, as that the discharge should only be impeached when the fraud was pleaded, they would hardly be construed as applying to a case where the creditor had no opportunity to plead the fraud. But there are no negative words in the statute.

The same question may arise about giving the discharge in evidence in favor of the debtor. The 4th section provides, that the discharge shall and may be *pleaded* as a full and complete bar to all suits. If the bankrupt, when sued, omits to plead the discharge, he cannot give it in evidence. But where the form of the pleadings is such as to afford him no opportunity of pleading the discharge, there can be no doubt that it may be given in evidence on the trial without notice. It was so given in evidence in this case, though there was about as much ground for rejecting it, as there was for rejecting the answering evidence which was offered by the creditor. There was, I think, no ground for rejecting either of them.

There are many cases in the law where a party must plead or give notice of the particular matter which he intends to prove on the trial, or he will be precluded from proving it; but so far as I can recollect, the rule never applies where the party had no opportunity, in the regular course of pleading, of setting the matter up. I see no good reason why an exception should be made in this case.

I have considered the question as though the defendant knew of the discharge at the time of pleading. But there is no evidence of that fact, nor any sufficient ground for presuming it. It may well be that he never heard of the discharge until it was offered in evidence on the trial. The bankrupt law did not require personal service of notice upon creditors, and it often happened that they did not hear of the application until after the debtor was discharged. I well recollect that in several motions which were before the supreme court while I sat in it, the creditor made affidavit that he never heard of the proceedings in bankruptcy until the discharge was set up in answer to an action. It will be presumed, for the purpose of upholding the discharge, that such notice was given as the statute requires.

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(*Norriss v. Goss*, 2 *Spear's Law Rep.* 80.) But that is not actual notice; nor is the presumption to be indulged for any other purpose than that of giving effect to the discharge. There are many cases where the publication of a notice in a newspaper is made to supply the place of process to bring the party into court; and such notice will be sufficient to uphold the proceedings. But it proves nothing against the party in relation to any other matter.

My opinion that the voluntary branch of the bankrupt law, under which branch this discharge was obtained, is unconstitutional, has already been declared; (*Sackett v. Androgs*, 5 *Hill*, 327;) and time and reflection have only served to confirm me in that conclusion. But as this judgment must be reversed on another ground, it is not necessary that the court should pass upon that question on the present occasion.

I am of opinion that the judgment should be reversed, and a *venire de novo* be awarded.

Ordered accordingly.

BINGHAM, administrator, &c. *appellant*, vs. WEIDERWAX and SUTHERLAND, *respondents*.

The covenant of seisin, if the grantor has no title, is broken as soon as the deed is executed, and the grantee's right of action upon such covenant becomes immediately perfect.

Nor is it any defence, either at law or in equity, to such an action, that the premises have been sold and the grantee dispossessed under a mortgage which the grantee assumed to pay, and subject to which he took the conveyance.

In the action upon the covenant of seisin, for the purpose of ascertaining the measure of damages, the true consideration, and the fact that only part of it has been paid, may be shown by parol, although the deed expresses a different consideration, and acknowledges that the whole of it has been paid; and there is therefore no occasion, in such a case, to resort to a court of equity for relief.

It seems, that on the dissolution of a corporation, the title to real estate held by it reverts back to its original grantor and his heirs, unless there is some provision in the charter, or some other statutory provision to avert that consequence.

Bingham v. Weiderwax.

APPEAL from chancery. Henry Weiderwax and James Sutherland filed their bill in chancery, before the vice chancellor of the third circuit, against Anson Bingham, administrator of the estate of Jacob S. Van Buren, deceased, stating the case in substance as follows :

On the 15th day of January, 1838, the said Jacob S. Van Buren applied to the President, Directors and Company of the Hillsdale and Chatham Turnpike Road, a body politic and corporate, to purchase certain real estate of which that corporation was seized, situated in the town of Schodack, county of Rensselaer. An agreement was thereupon made between the directors of the corporation and Van Buren for the sale of such real estate for the price of \$3850, and articles of agreement, dated on that day, were drawn up and executed between the complainant Weiderwax, as secretary of the corporation, of the first part, and Van Buren of the second part, whereby it was provided that the premises should be conveyed to Van Buren on the first day of April then next; and the said Van Buren on his part agreed, in the same articles, to pay for the land the sum of \$3800, as follows: he was to assume and pay two mortgages which encumbered the premises, one of \$2000 and the other of \$1000, and the balance of the purchase money, being \$850, he was to pay on the 5th day of May then next.

On the said first day of April, 1838, the complainants and Story Gott, since deceased, were directors of the corporation, and together constituted a majority of such directors; the said Story Gott being also president, and the complainant Weiderwax being secretary. And on that day the complainants and said Gott, with the advice and consent of the other two directors, executed under their hands and seals to said Van Buren a conveyance in fee of the said premises, purporting to be for the consideration of \$3850, *and subject to the two mortgages mentioned in the aforesaid articles of agreement*, covenanting in and by such deed that they, the said complainants and Story Gott, "at the time of the execution of the deed, were the true and lawful owners of the premises in right of the President, Directors and Company of the Hillsdale and Chatham Turn

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pike Road, and were seized of a perfect estate therein in fee simple, and had lawful right and authority to sell and convey the same in manner aforesaid." The bill alleged that \$3000, being the amount of the two mortgages on the premises, was deducted from the purchase money, and the balance, \$850, was paid by Van Buren to the corporation.

The bill further alleged, that at the time of the conveyance the title of the premises was in the corporation, that all parties to the conveyance so understood it, and none of them supposed the title to be in the complainants and Gott, *but being ignorant of the law they supposed that such conveyance would vest the title in the grantee*; that immediately after the execution thereof, said Van Buren went into possession of the premises, and occupied the same personally, or by his tenants, until his death in 1841, and that after his death, the defendant, as administrator upon his estate, received the rents and profits until July 20, 1843.

The bill also alleged that neither Van Buren nor the defendant as such administrator, ever paid the two mortgages on the premises, that the owner of the mortgage of \$2000 in March, 1842, commenced proceedings to foreclose the same in chancery, and obtained the usual decree of foreclosure and sale in May, 1843, under which the premises were sold on the 20th of July, 1843, and purchased for the sum of \$2620 by one Griffith, who took possession under his purchase. In October, 1844, the defendant, as administrator of the estate of Van Buren, commenced an action at law against the complainants, (Story Gott having previously died.) upon the covenant of seisin contained in the aforesaid conveyance, alleging in his declaration, as a breach, that the complainants and Gott were not seized of an estate in fee in the premises, and had not power and authority to convey the same.

The bill insisted that neither Van Buren, in his lifetime, nor the defendant as administrator, since his death, had sustained any damage or injury by any act or omission of the complainants, that the premises were sold under the said decree of foreclosure, *by reason of the mere neglect of said Van Buren and*

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of the defendant as administrator to pay the mortgage ; also that the deed was by mistake erroneously drawn in this respect, to wit, that it expressed a consideration of \$3850, and yet conveyed the premises subject to the said two mortgages of \$3000, which would make the consideration appear to be \$6850, whereas the true consideration was as before stated only \$3850. The facts stated were claimed by the bill to constitute an equitable defence to the action at law upon the covenant of seisin, and the prayer was for a perpetual injunction against that or any other suit upon such covenant, and for general relief. The defendant demurred to the bill for want of equity, and upon other grounds more specially stated.

The vice chancellor overruled the demurrer, and his decision was affirmed by the chancellor on appeal. The defendant appealed to this court.

H. Z. Hayner, for the appellant.

J. H. Reynolds, for the respondents.

JEWETT, C. J. It is assumed by the chancellor that the land was not lost to Van Buren in consequence of a defect of title ; but that if the mortgage was properly foreclosed, the title had been lost by his neglect to pay it. I think there is an obvious mistake in that conclusion. The bill concedes that the title to the lands was not conveyed to Van Buren, although he as well as his grantors supposed it was, by the deed executed to him. The complainants and the administrator of Van Buren have since discovered that Van Buren's grantors were never seized of any estate in the lands ; that the turnpike corporation, at the time of executing the deed, was seized of these lands, and so continued, until its dissolution in 1840. How then can it be said that Van Buren lost the land or the title thereto, (which he never had,) by neglecting to pay the mortgage? If he had paid it, it would not have invested him or his grantors with the title. Neither lost the land or title to it, by the foreclosure and sale. Payment of the mortgage by Van Buren is

his lifetime, or by his administrator after his death, could have had no other effect than to increase the amount of damages which he or his administrator would be entitled to recover of his grantors for the breach of their covenant of seisin contained in their deed to him. Van Buren's right of action for the breach of that covenant was perfect the instant the deed was executed. (*Hamilton v. Willson*, 4 John. 72; *McCarty v. Leggett*, 3 Hill, 134.) It did not arise or depend in any respect upon the foreclosure of the mortgage and sale under it. Nor did the foreclosure and sale in the least affect the complainants' rights or liabilities.

If Van Buren had paid the mortgages, and then he or his administrator, after his death, had brought an action for the breach of the covenant of seisin, it would not have been a good ground in equity for relief against their covenant, that he could have compelled the corporation before its dissolution to convey the title to him. He would have the right to rely on his covenant and take his remedy by action upon it.

Van Buren's grantors agreed with him that they were seized of the land, and it was their business to see that their covenant in that respect was kept, when they executed the deed. Equity may compel parties to execute their agreements, but has no power to make agreements for them, or to substitute one for another. And besides, it appears from the bill that the corporation even did not lose the land or its title by the foreclosure and sale under the mortgage. It had lost its title nearly or quite three years before, in 1840, by its dissolution. At that time, and for that cause, the title reverted back to its original grantor or his heirs, there being no provision in its charter or in any other statute to avert that consequence upon its dissolution. (*Angel & Ames on Corp.* 128, 129; 2 *Kent's Com.* 305.)

At all events the bill shows the dissolution of the corporation at the time mentioned, without showing that the title to their lands was saved in such manner as that Van Buren, or his representatives, could by any means have acquired it under the agreement and deed, even if he had paid the mortgages subse-

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quently and before foreclosure ; and it is not set up that he had agreed to pay, or that the holders of the mortgages were bound to receive, or would have received payment of the mortgages, or either of them, prior to the time of the dissolution of the corporation, or prior to the time of the death of Van Buren ; or that he at any time knew or had notice that he could compel the corporation, or any other person, to convey to him the title to said land ; or even that he knew or was informed that his grantors were not seized when they executed the deed. Therefore it seems to me that there is no ground upon which to sustain this bill, founded upon the neglect of Van Buren to pay the mortgages, or either of them.

But the chancellor held that even if the bill could not be sustained to the whole extent claimed, the demurrer was properly overruled on the ground that the complainants were entitled to relief so far as to restrict the defendant's claim upon the covenant to the amount of the purchase money actually paid by Van Buren, with interest thereon. I take it that the principle is settled, that if the complainants can avail themselves of this branch of their defence at law, and that objection is raised by the demurrer to the bill they should be left to make it in the suit at law ; and the decree overruling the demurrer cannot be sustained on that ground. (*Colton v. Ross*, 2 *Paige*, 396, 400.) And I think it is well settled, that for the purpose of ascertaining the damages to which a plaintiff may be entitled in an action at law for the breach of the covenant of *seisin* in a deed, the true consideration, and that all or any part remains unpaid, may be shown, notwithstanding a different consideration is expressed in the deed, and although it contains an acknowledgment on the part of the grantors that it has been paid at the time of or before the execution of the deed. (*McCrea v. Purmont*, 16 *Wend.* 460 ; *Shephard v. Little*, 14 *John.* 210 ; *Morse v. Shattuck*, 4 *N. Hamp. R.* 229 ; *Greenvault v. Davis*, 4 *Hill*, 647 ; *Belton v. Seymour*, 8 *Conn. R.* 304 ; *Cowen & Hill's Notes*, 1441, 1442.)

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My conclusion therefore is that the decisions of the court below are erroneous and should be reversed, and the bill dismissed with costs.

Ordered accordingly.

VAN LEUVEN vs. LYKE and DUMOND.

The owner of a domestic animal is not in general liable for an injury committed by such animal, unless it be alleged and shown that the defendant had notice of its vicious propensity.

But if the animal is unlawfully in the close of another and commits the mischief there, the owner is liable without alleging or proving a *scienter*. *Per* JEWETT, C. J.

And in such cases the declaration should be for breaking and entering the close, and the particular mischief, e. g. the killing of another domestic animal, should be alleged in aggravation of the trespass.

The declaration in a justice's court alleged that the defendants' sow and pigs mangled and tore a cow and calf of the plaintiff so that they died. The evidence tended to show that the injury was committed as alleged, and that it was done while the sow and pigs were trespassing in the plaintiff's close. *Held* that the plaintiff could not recover for the reason that there was no allegation or proof of a *scienter*, and no allegation of a breach of the plaintiff's close.

VAN LEUVEN sued Lyke and Dumond in a justice's court and recovered judgment, which was affirmed by the common pleas on certiorari, and reversed by the supreme court on error. (*See* 4 *Denio*, 127.) The plaintiff brought error to this court. The case is sufficiently stated in the opinion of the court, as delivered by JEWETT, C. J.

M. Schoonmaker, for the plaintiff in error.

T. R. Westbrook, for the defendants in error.

JEWETT, C. J. It is alleged in the plaintiff's declaration "that on the 27th day of November, 1844, at &c. the defendants were the owners of a certain sow and pigs, which sow

1	515
117	288
1	515
120	319
1	515
154	225

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and pigs, to wit, on the day and year aforesaid, to wit, at the place aforesaid, bit, damaged and mutilated and mangled a certain cow and calf of the plaintiff, while the said cow was in the act of calving, so that said cow and calf both died, to the plaintiff's damage \$50." To which the defendants pleaded the general issue. There was evidence given on the trial, sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said injury. But there is no allegation in the declaration, or evidence given on the trial, that swine possess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of the plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew or had notice that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close and there committed the mischief complained of.

It is a well settled principle that in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetæ naturæ*, such as horses, oxen, cows, sheep, swine, and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *feræ naturæ*, such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do *without notice*; on the ground that by nature such animals are *fierce and dangerous*. (9 *Bac. Abr. tit. Trespass*, I, 505, 6; *Jenkins v. Turner*, 1 *Ld. Raym.* 109; *Mason v. Keeling*, *id.* 606; *S. C.* 12 *Mod.* 332; *Rex v. Huggins*, 2 *Ld. Raym.* 1583; 1 *Chit. Pl. ed.* 1812, 69, 70; *Vrooman v. Lawyer*, 13 *John. R.* 339; *Kinkley v. Emerson*, 4 *Cowen*, 351.) But this rule does not apply where the mischief is done by such animals while committing a trespass upon the close of another.

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The common law holds a man answerable not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many of such animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land, and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregrit*, though he had no notice in fact of such propensity. (3 Bl. Com. 211; 1 Chit. Pl. 70.) And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the enclosure of the former under such circumstances. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close in such action is the substantive allegation, and the rest is laid as matter of aggravation only.

This principle is recognized as sound by several adjudged cases. In the case of *Beckwith v. Shordike and Hatch*, (4 Burr. 2092,) the action was trespass for entering the plaintiff's close with guns and dogs and killing his deer. The evidence showed that the defendants entered with guns and dogs, into a close of the plaintiff adjoining to his paddock, and that their dog pulled down and killed one of the plaintiff's deer. It was held to be *sufficient* evidence to prove the defendants trespassers, and they were held liable for the injury done by their dog, although it was not shown that they had any knowl

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edge or notice of the propensity of the dog to do such or similar injury.

In *Angus v. Radin*, (2 *South. Rep.* 815,) the action was trespass for the defendant's oxen breaking into the enclosure of the plaintiff and there goring his cow, so as to kill her; and upon the ground that the defendant had neglected to confine his oxen on his own land and that they were trespassing on the land of the plaintiff, he was held liable for the injury done, although it was not alleged or proved that he knew or had notice of the propensity of his oxen to commit such an injury. And so in *Dolph v. Ferris*, (7 *Watts & Serg.* 367,) where the action was trespass before a justice of the peace and there tried without any declaration having been filed; therefore the court held that the case must be considered as if the case had been tried on the most favorable declaration for the plaintiff, which the evidence would have warranted. The evidence was that the bull of the defendant, which was running at large, broke and entered into the enclosure of the plaintiff, where his horse was feeding on the grass growing therein, and gored him so that he died by reason thereof in a few days. The court held it to be clear from the evidence, that the defendant might have been declared against for having broken and entered the close of the plaintiff, and the grass and herbage of the plaintiff there lately growing with his bull eaten up, trod down and consumed, and might also have been charged in the same declaration with having killed or destroyed the plaintiff's horse or colt with his bull.

But in the case under consideration, there is no allegation, charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a *scienter*. || Had the plaintiff stated in his declaration such ground of liability, or had charged that the swine broke and entered his close and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but as he has not stated in his declaration either ground of liability, the defendants ought

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not to be deemed to have waived the objection by not making it specifically before the justice. I think the judgment should be affirmed.

Judgment affirmed.

WORRALL VS. PARMELEE.

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The declarations of a former owner of personal property are not admissible in evidence to prove a sale of such property to a party claiming under him.

And where such evidence was duly objected to, and the party objecting afterwards called as a witness the person whose declarations had been given in evidence, and examined him in regard to the alleged sale; *held*, no waiver of the objection.

An error in the court below, which on its face could do no possible injury, is no cause for reversing a judgment. But where the error is in the admission of illegal evidence which bears in the least degree on the result, it cannot be disregarded.

Per JEWETT, C. J.

Accordingly, where illegal evidence tending to establish a certain fact was received after objection duly made; *held*, that the error could not be disregarded, although the party objecting afterwards introduced evidence which tended to establish the same fact.

ON error from the supreme court. Richard W. Parmelee sued William H. Worrall, in July, 1846, before a justice of the peace, and declared in trespass for entering his close and cutting down and carrying away a field of rye. The defendant pleaded not guilty, and gave notice that he would show a license to enter from the grantor of the plaintiff, and that the rye was his property.

On the trial the plaintiff proved that he was in possession of the premises at the time of the alleged trespass, which was about July 1, 1846, and that he had been in possession since the 1st of May previous; also that the defendant entered and cut and carried away the rye after being forbidden so to do. The plaintiff then rested.

The defendant proved that the rye was sown by one Brower, who had been a tenant of the premises under one Gridley from whom the plaintiff received the possession, and that as such

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tenar. Brower was entitled to the crop. The defendant then offered to prove certain declarations of Brower to the effect that he had sold the rye to the defendant. This was objected to, but the justice overruled the objection, and the evidence was thereupon given.

The plaintiff then called the said Brower as a witness, and proved by him that he sold the rye to the plaintiff after the first of May, 1846. The plaintiff also *examined the witness in regard to the alleged sale to the defendant, and his evidence on that subject tended strongly to show that before the 1st of May he had sold the rye to the defendant*. The justice rendered judgment for the defendant, which being removed into the common pleas by *certiorari*, was affirmed in that court. The plaintiff brought error into the supreme court where the judgment was reversed. The defendant brings error to this court.

J. H. Weeks, for the plaintiff in error.

C. W. Swift, for the defendant in error.

JEWETT, C. J. It may be inferred from the facts proved, that prior to April or May, 1846, Gridley was the owner of the land on which the trespass is alleged to have been committed by the defendant, and that while thus being the owner, Brower had occupied the premises as his tenant until some three months prior to May, and had sowed it with rye; to whom the crop belonged at the time Gridley sold and delivered possession of the premises in April or May to Parmelee. It does not seem, from the justice's return, that Parmelee claimed to have become the owner of the rye as purchaser of the land on which it was then growing. But he, as well as Worrall, respectively claimed the crop as purchasers from Brower. Parmelee showed that prior to and at the time of the alleged trespass he was in the actual possession of the premises, that the defendant entered upon the land, cut and carried away the rye, of the value of from \$30

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to \$40; and then rested; having clearly shown a *prima facie* right to recover for the injury sustained.

The defendant then attempted, in his defence, to show that he was the owner of the rye by purchase from Brower. To do this he proposed to give in evidence the declarations of Brower to that effect. The plaintiff objected to such evidence as incompetent; but the justice overruled the objection and admitted the evidence. The defendant then proved by two witnesses that Brower on two different occasions in effect said that he had sold the rye to the defendant, and then rested his defence. The plaintiff introduced Brower as a witness, who testified that the bargain which he made with the defendant for the sale of the rye, was a conditional one, that is, he was to pay him a certain sum for it the first of May, which he failed to do, and had not at any time paid him; that after the first of May he sold the rye to the plaintiff, who paid him for it.

The decision of the justice upon the objection taken to the admission of the evidence of Brower's declarations, was clearly erroneous. Such evidence is nothing more than hearsay (*Paige v. Cagwin*, 7 *Hill*, 361; *Beach v. Wise*, 1 *id.* 612.)

But it is insisted in behalf of the defendant, that the plaintiff waived his objection to such evidence, by introducing Brower as a witness in the cause; upon the principle that the case shows that there is enough, exclusive of the illegal evidence, to sustain the judgment of the justice. There are many cases which hold that an error in the court below, which on its face and by legal necessity, could do no injury, is not cause for a reversal of the judgment. But where the error is in the admission of illegal evidence which bears in the least degree on the question in issue, it cannot be disregarded. (*The People v.*

Wiley, 3 *Hill*, 194, 214.) So also where the sole question on a bill of exceptions turned on the competency of a witness produced to testify to a fact fully proved by two other witnesses, it was held that the court could not reject the evidence of such witness as unnecessary, on the ground that it was impossible to say that the jury disregarded it; and the witness being ad-

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judged incompetent, the judgment in the court below was reversed. (*Marquand v. Webb*, 16 John. 90.) And to the same effect is the case of *Osgood v. The President and Directors of the Manhattan Co.* (3 Cowen, 612.) The judgment of the supreme court should be affirmed.

Judgment affirmed.

HILL and SANFORD vs. COVELL.

A special verdict should state facts and not merely the evidence of facts, so as to refer to the court only the consideration of questions of law.

To authorize a judgment for the plaintiff upon a special verdict in an action of trover, the verdict should either find a conversion of the property, or state such facts as to leave the question of conversion one of law merely.

A demand and refusal are only evidence of conversion, and may be repelled by proof showing that a compliance with the demand was impossible.

Therefore, where in trover the special verdict stated a demand and refusal, but did not show that the property was in the possession of the defendants at the time of such demand, there being also other evidence stated in the verdict tending to show that the property was not then in their possession; *held*, not sufficient to entitle the plaintiff to judgment on the verdict.

And although the special verdict also found that the defendants had sold the property, yet it appearing that they had authority to sell it on account of the plaintiff, and the fact not being negatived that the sale was for the purpose and in the manner authorized; *held*, that the court could not adjudge that there had been a conversion.

COVELL sued Hill and Sanford in the supreme court, in trover, for 52,900 feet of pine lumber. The cause was tried at the Chemung circuit in May, 1844, when the jury found a special verdict, assessing the plaintiff's damages contingently at \$500, on which the supreme court gave judgment for the plaintiff. For a statement of the case and the opinion of the supreme court, see 4 Denio, 323. The defendants bring error to this court.

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S. Stevens, for the plaintiffs in error.

N. Hill, Jr. for the defendant in error.

GARDINER, J. In the action of trover the jury may undoubtedly refer the question of a conversion to the court as a question of law. But in order to do this, the record must state every fact necessary to the legal conclusion which will then be declared by the court. The difficulty in the present case is that the special verdict neither finds a conversion in terms, nor the facts that will enable us to determine it as a question of law in favor of the plaintiff.

To maintain this action the plaintiff must establish property in himself, and a tortious conversion by the defendant. In this case the special verdict has not found in terms that the plaintiff was the owner of the lumber, and if this fact is to be implied against the defendants from the agreement between Covell and Potter, it appears from that instrument that although the title was to be held by the plaintiff, yet Potter was constituted his agent to deliver the lumber to the defendants, to employ them to sell it, and to account for the avails to him and the plaintiff respectively, according to the agreement. The defendants, therefore, upon the receipt of the lumber from Potter, acquired by the assent of the plaintiff a rightful possession coupled with an authority to dispose of the property.

The sale of the lumber subsequently by the defendants was consistent with the rights of the plaintiff as general owner, and of itself, consequently, would not constitute a conversion. Now the jury have found that the defendants disposed of the greater part of the lumber in 1842, without stating the time more particularly or the quantity, and the residue in 1843. Their verdict does not state however whether any of the property was sold in a manner or for a purpose not authorized by the agreement set forth, or even by the express directions of the plaintiff contained in his letter of the 8th of October. These are all facts which we must presume in order to determine the question of a tortious conversion.

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It is true that the special verdict set forth a demand of the lumber by the plaintiff in April, 1843, and a refusal by the defendants to deliver the same, unless the advances made by the latter to Potter were first paid. But the jury have not found the fact that any part of the lumber was then in the possession or under the control of the defendants; on the contrary it appears affirmatively from the verdict that the greater part of the property had been sold, and that all might have been, prior to the demand. A demand and refusal are but evidence of a conversion. As evidence it may be met and repelled by proof that a compliance with the demand was impossible. (5 Burr. 2825; 1 Cowp. 439.) It is sufficient to say that we have only evidence in this case tending to prove a conversion. We are first to presume certain facts, and then declare the law applicable to them. The first is the exclusive province of the jury. The office of a special verdict is to present facts, and not merely the evidence of facts. (8 Cowen's R. 413, 414.) It was observed by C. J. Dallas, "that sufficient facts must be stated on the record to refer to the court the consideration of the question of law." (8 Price's R. 383.) This is an intelligible rule which obviously has not been complied with in this case. The defects in the special verdict were not alluded to in the supreme court. They present, however, an insuperable obstacle to a decision by this court of the questions intended to be presented by these parties. There must be a new trial upon which the facts may be ascertained and properly presented upon the record.

Ordered accordingly.

PITTS v. Wilder.

PITTS vs. WILDER.

The declarations of a person in possession of lands are competent evidence against himself and all persons claiming under him, for the purpose of showing the character of his possession, and by what title he claims.

Where A. being in possession of lands and claiming to hold under a contract from the Holland Land Company, executed to B. an instrument purporting to grant the absolute right to flow the lands by means of a mill dam, B. knowing the manner in which A. claimed to hold; *held*, in an action on the case for flowing the lands, that such instrument was not admissible in evidence to lay the foundation of a *user adverse* to the plaintiff who had acquired the title of the Holland Land Company.

ON error from the supreme court, where Wilder recovered judgment against Pitts in an action on the case. The facts are stated in the opinion of Jewett, C. J.

S. Stevens, for the plaintiff in error.

N. Hill, Jr. for the defendant in error.

JEWETT, C. J. Wilder brought an action upon the case against Pitts for flowing his lands by means of a mill dam, maintained by him across the Oak Orchard creek, in the town of Ridgeway, in the county of Orleans. The suit was commenced in July and tried in October, 1843.

On the trial it was admitted that the defendant took possession of the mill and dam in question in the spring of 1838, under a deed bearing date the 8th of May in that year. The plaintiff, to show title in himself of the premises claimed to be flowed, gave in evidence a deed from William Willink and others, constituting the Holland Land Company, to him conveying sixty-five acres of land, part of the premises in question, bearing date the 3d of January, 1834; and also another deed from the same grantors to him, conveying one hundred acres, also part of the premises in question, bearing date 13th of January, 1832, both of which were acknowledged and recorded at about the time of their respective dates. The plaintiff also

Pitts v. Wilder.

proved possession of the premises described in both deeds, and that a portion of these lands being wild and uncultivated had been flowed a number of years by reason of the defendant's dam, and the amount of the damages sustained.

The defendant proved that one Gilbert Howell erected the first dam in 1816, and built a saw and grist mill, and occupied them until the year 1836; that the dam had been maintained ever since, except when carried away by floods, and then had been rebuilt in a reasonable time; and that said Howell and one Isaac Bennett entered into a written agreement, which was produced, bearing date the 10th day of October, 1815, which the defendant's counsel offered to read in evidence, in and by which agreement the absolute right to flow the land claimed by the plaintiff, and proved to have been flowed, purported to have been granted and conveyed by Bennett to Howell, his heirs and assigns; offering to show at the same time a regular *claim* of title and possession from Howell to the defendant of the mill dam and mills, and the right so attempted to be conveyed. The plaintiff's counsel objected to the evidence, which objection the judge sustained and the defendant excepted. Howell had previously testified that Bennett told him that he occupied the flat lands, (the lands overflowed,) by an article of agreement from the land office at Batavia. As to the evidence of what Bennett told Howell about his title, the counsel for the defendant, objected as irrelevant, but the judge overruled the objection and the defendant's counsel excepted.

The evidence given by the parties upon the question whether the plaintiff's land had been always flowed to the same extent since the erection of the dam in 1816, or whether within six or eight years prior to the commencement of the suit, the dam had been raised higher by the defendant, and that since that time the said lands had been flowed to a greater extent by reason thereof, was conflicting. The plaintiff had a verdict and a bill of exceptions was signed, upon which a new trial was moved for but denied, and judgment rendered for the plaintiff upon the verdict. Two questions are made in this case, 1st. The defendant insists that the declarations made by Bennett

to Howell, that he occupied the flat lands by an article from the land office at Batavia, were irrelevant evidence. They were made to Howell at the time Bennett was in possession of the premises, and at the time he entered into the agreement with Howell conveying, or purporting to convey to him, a right or privilege to flow the lands. The defendant claims under Howell, who claims through Bennett that right. To show the character of his possession, those declarations would have been good as against Bennett, and of consequence against all who claim under him. (*Jackson v. Bard*, 4 *John*. 230.) I think the objection was correctly disposed of.

2. The defendant insists that the judge erred in sustaining the objection to his offer to read the agreement made between Howell and Bennett in evidence, accompanied by evidence showing that there had been a regular *claim* of title and possession from Howell to the defendant of the mill dam, mills, and the right so attempted to be conveyed. As the evidence stood, no title to the premises or any portion of them had ever vested in Bennett; and for more than twenty years before the suit was commenced he had not been in possession. All the right which it was shown Bennett had or claimed to have, to occupy as he did, for six or eight years subsequently from 1815, was under an article of agreement from the office of the Holland Land Company at Batavia. The plaintiff succeeded to the title of the Holland Land Company to the premises, in part, in 1832, and to the residue in 1834, and went into possession. The agreement between Bennett and Howell, which was offered in evidence, was wholly irrelevant. It did not convey to Howell a title sufficient to vest an adverse possession, or adverse user, (*Jackson v. Frost*, 5 *Cowen*, 346,) because Bennett, at the time he entered into the agreement, did not pretend to have any title to the premises himself, and this was known to Howell. And besides, the defendant did not pretend that he derived title to the right to flow in any other way than by *an uninterrupted adverse user of twenty years*; and whether Bennett executed such an agreement or instrument was a matter of no sort of consequence. The evidence offered in connection with reading

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the instrument, could not aid the defendant; and if it had been offered or so considered, independent of the agreement or instrument, I do not see its relevancy or competency. That branch of the offer was to show a regular *claim* of title and possession from Howell to the defendant of the mill dam, mills, and the right so attempted to be conveyed. Now a *claim* of title and possession would amount to nothing, and therefore the evidence of it was irrelevant. The offer was not to show an uninterrupted *user* from Howell to the defendant of the mill dam, mills, and the right to flow the plaintiff's lands.

Evidence of that character had been given, and was pertinent. My conclusion is that there is no error in the judgment of the court below, and that it should be affirmed.

Judgment affirmed.

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GARDNER vs. HEART.

In an action on the case for an injury to real property, the plaintiff must show either title or actual possession in himself at the time the injury was committed.

And if no one was in the actual possession, it will not be sufficient proof to authorize a recovery, to show that the premises were conveyed to the plaintiff at some period prior to the injury by a person not shown to have been in possession or to have title.

THIS was an action on the case brought in the supreme court by Gardner against Heart for an injury to three lots of land which the plaintiff claimed to own in the city of Troy. The defendant was the owner of a hill called Mount Ida in the vicinity of the lots, and the injury complained of was occasioned, as alleged, by the defendant carelessly and negligently undermining the hill, so as to cause a slide precipitating the earth upon the plaintiff's lots. The cause was first tried before WILLARD, circuit judge, in 1843, when the plaintiff was non-

Gardner v. Heart.

suit. The supreme court on bill of exceptions set aside the nonsuit and ordered a new trial. See 1 *Denio*, 466, where the case, as it then appeared, is stated. Another trial was had before PARKER, circuit judge, in April, 1847, when a verdict was had for the plaintiff. The defendant moved the supreme court for a new trial on bill of exceptions, which motion was denied. See 2 *Barb. Sup. Court Rep.* 165, for a statement of such questions as arose on the last trial, and the opinion of the supreme court. Among those questions was the following: The plaintiff gave in evidence a deed from Charles M. Baker to himself for the lots which had been injured, dated in 1829, but he neither proved that the grantor had any title, nor that either Baker or himself had been in possession. The defendant moved for a nonsuit, and urged as one of the grounds, that the plaintiff had not shown title to the lots claimed to have been injured. The motion was denied. The defendant appealed to this court under the judiciary act of December, 1847.

J. Pierson, for the defendant.

D. L. Seymour, for the plaintiff.

WRIGHT, J. After the plaintiff had rested, the defendant's counsel moved for a nonsuit on the ground that the former had shown no legal title to the lots in question. At this time the plaintiff had only introduced and read in evidence a deed from Charles M. Baker, dated July 24, 1829, purporting to convey to him the lots in fee. No evidence had been given, nor was it subsequently supplied, of title in his grantor; yet the judge refused to nonsuit the plaintiff, and affirmatively charged the jury that "enough had been made out to show that the plaintiff was the owner of the lots." They were unoccupied city lots. The plaintiff was bound to show either a regular paper title or actual possession. The barely giving in evidence of a deed to him of the premises, fell short of proving a title; yet the judge must have acted upon the assumption that it did prove such title, both in denying the nonsuit and in charging the jury.

Houghtaling v. Kilderhouse.

After the nonsuit had been denied, considerable evidence was incidentally given tending to show an actual possession of the lots by the plaintiff, insomuch that had the question of possession, upon such evidence, been submitted to the jury, and they had found for the plaintiff, we would hardly have disturbed their verdict on that ground. But no question of actual possession was made or submitted; and the judge seems to have continued to the end the error into which he had fallen on the motion for the nonsuit.

A new trial must be granted in which this error may be corrected, costs to abide the event.

New trial granted.

HOUGHTALING vs. KILDERHOUSE.

In an action for slander, it is not competent for the plaintiff to introduce evidence of his good character in reply to evidence introduced by the defendant tending to prove the truth of the charge.

ON error from the supreme court, where Houghtaling sued Kilderhouse in slander for charging the plaintiff with having killed the defendant's horses by administering poison to them. The defendant pleaded not guilty and gave notice of justification. On the trial, after the plaintiff had proved the speaking of the words, the defendant gave circumstantial evidence tending to show that the charge was true. The plaintiff also introduced evidence upon that issue in reply, and in connection with such evidence offered to prove that his *general character was good*. This was objected to by the defendant and excluded. The plaintiff excepted. The jury having found a verdict for the defendant, the plaintiff moved in the supreme court for a new trial, which was denied by that court, and judgment rendered for the defendant. (*See 2 Barb. Rep. 149.*)

Lyme v. Ward.

H. G. Wheaton, for the plaintiff in error, insisted that the issue on the trial involved simply the question of guilt or innocence of a crime, amounting to felony and involving gross moral turpitude. In such cases the general good character of the party accused is always a circumstance to be submitted to the jury to repel the presumption of guilt; particularly where the evidence to sustain the charge is, as in this case, purely circumstantial. (*Ruan v. Perry*, 3 *Caines*, 120; *Townsend v. Graves*, 3 *Paige*, 453; *Harding v. Brooks*, 5 *Pick.* 244; *Greenl. Ev.* § 426; 2 *Starkie's Ev.* 216, 217, n. 4; *Powell v. Harper*, 5 *C. & P.* 590; *Petrie v. Rose*, 5 *Watts & Serg.* 364.)

R. W. Peckham, for the defendant in error, cited upon the question, *Goff v. St. John*, (16 *Wend.* 646;) *Fowler v. The Aetna Fire Ins. Co.* (6 *Cowen*, 673;) *Humphrey v. Humphrey*, (7 *Conn. R.* 116;) *Potter v. Webb*, (6 *Greenl. Rep.* 141;) *Anderson v. Long*, (10 *Serg. & Rawle*, 55;) *Nash v. Gilkeson*, (5 *id.* 352;) *Woodruff v. Whittlesey*, (*Kirby*, 60;) *Attorney General v. Bowman*, (2 *Bos. & Pull.* 532.)

THE COURT, after advisement, were of opinion that the point had been properly decided in the courts below, and therefore the judgment was affirmed.

LYME vs. WARD, survivor, &c.

It is irregular to serve an assignment of errors before one has been filed; and where the assignment was not filed until the next day after it was served, the rule to join in error and all subsequent proceedings set aside.

Where the judgment of the court below is reversed by default in not joining in error, the remittitur should not be sent to the court below until ten days have elapsed.

Where the action was commenced before the code of procedure took effect, this court may grant costs on a special motion; and the amount is to be settled by taxation.

But where the suit is commenced after the code took effect, this court cannot grant costs to the party who makes a special motion.

Lyme v. Ward.

WRIT of error by Lyme to remove a judgment against him in favor of Ward and Goadby, in the New-York C. P. The writ of error was returned and filed with the clerk of this court on the 30th of June last. On the same day the plaintiff in error served an assignment of errors, with notice that the defendant Ward, who had survived Goadby, was required to join in error within eight days, or be precluded : but an assignment of errors was not filed until the next day, the first of July. On the 11th of July, the plaintiff in error entered an order precluding the defendant in error from joining in error. On the 13th of July, the plaintiff in error entered an order reversing the judgment of the court below with costs ; and on the same day a remittitur was issued.

N. Hill, Jr. for the defendant in error, moved to set aside the order precluding the defendant from joining in error, and all subsequent proceedings, for irregularity.

S. Stevens, for the plaintiff in error.

BRONSON, J. The plaintiff in error was irregular in serving an assignment of errors before one had been filed : (*Rule 4.*) and the orders precluding the defendant from joining in error, and reversing the judgment, were therefore unauthorized. We are also of opinion, that the remittitur should not have been sent to the court below until the expiration of ten days from the reversal of the judgment. (*Rule 20.*)

As the defendant in error has been obliged to come here at considerable expense to get rid of an irregular proceeding, he ought to have costs on the motion, if we have any authority to give them. The 270th section of the code of procedure forbids the allowance of costs to the party who makes a motion. But originally, that section did not apply to this suit, which was commenced before the first of July. (*Code, § 8, 391.*) And although it has since been applied to proceedings in such suits subsequent to the first of July in certain specified courts, this court is not among the number. (*Supp. Code, § 2.*) We,

Van Dewater v. Kelsey.

therefore, have power to allow costs. The amount must be settled by taxation. The statute authorizing the supreme court to make rules regulating the amount of costs on special motions does not apply to this court. (*Stat.* 1840, pp. 333, 336, §§ 15, 39; *Stat.* 1847, p. 321, § 8.) If the suit had been commenced since the first of July, the defendant in error would have been obliged to bear the expense of getting rid of the irregular proceedings of his adversary.

Motion granted, with costs to be taxed.

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VAN DEWATER, *appellant*, vs. KELSEY, *respondent*.

It rests in the discretion of the court of original jurisdiction to grant, continue, or dissolve a temporary injunction; and therefore a determination upon such a matter is not the subject of appeal to this court.

ON a bill filed by Van Dewater, a temporary injunction was issued, restraining the defendant from selling the property in controversy pending the litigation. In December last, after the defendant had answered the bill, the supreme court made an order dissolving the injunction; from which order the complainant appealed to this court.

S. Mathews, for the respondent, moved to dismiss the appeal, on the ground that an appeal would not lie in such a case. He cited 16 *Wend.* 369; 1 *Comst.* 43; 4 *John.* 510; 4 *Wend.* 173; 1 *Paige*, 97; 3 *John.* 566; 2 *Story's Eq.* §§ 863, 959, (a.); 3 *Daniel's Ch. Pr.* 1833, ch. 35, § 3.

N. Hill, Jr. for the appellant, cited 16 *Wend.* 373; 26 *id.* 152

Bronson, J. The granting, continuing and dissolving of temporary injunctions rests in the discretion of the court of original jurisdiction; and we think an appeal will not lie from the order dissolving this injunction.

Motion granted.

Selden v. Veramilya.

SELDEN, appellant, vs. VERMILYA and others, respondents.

Under the provisions of the code of procedure, there is no right of appeal to this court from an interlocutory determination of the supreme court, *e. g.* an order dissolving a temporary injunction.

On a bill filed, a temporary injunction was granted restraining the sale of the property in controversy pending the litigation. Pending the suit, in September, 1847, the supreme court in special term made an order dissolving the injunction; which order was confirmed by the supreme court on a re-hearing in general term, in September last. From the order made at the general term the complainant appealed to this court.

G. F. Comstock, for the respondent, moved to dismiss the appeal.

P. Y. Cutler, for the appellant.

BRONSON, J. Although this suit was commenced prior to the first of July, yet as the order of the general term dissolving the injunction was made since that day, the right to appeal depends on the code of procedure. (*Mayor of New-York v. Schermerhorn, ante, p. 423.*) And it is quite clear that the code does not give an appeal in such a case. (§§ 282, 11.)

Motion granted.

Marvin v. Seymour.

MARVIN and others vs. SEYMOUR and others.

An appeal will not lie to this court from an order of the supreme court in general term, denying an application to rehear an order made at a special term, where the order of the special term would not be the subject of appeal to this court, if it had been affirmed by the general term.

A motion to compel a party to appear before a master and submit to an examination is addressed to the discretion of the court of original jurisdiction, whose decision, therefore, cannot be reviewed in this court.

THE defendants made a motion before the supreme court in special term, for an order to compel one of the complainants to appear and submit to an examination before a master to whom the cause had been referred. The motion was denied. The defendants then applied to the supreme court in general term for a rehearing, which was denied in May last. From the order denying the rehearing the defendants appealed to this court.

N. Hill, Jr. for the respondents, moved to dismiss the appeal

H. Denio, for the appellants.

BRONSON, J. We held in *Gracie v. Freeland*, (*ante*, p. 228,) that a party had a right to a rehearing at the general term, after a matter had been decided against him at the special term; and we have acted upon that decision by reversing orders denying a rehearing. But it has been in cases where the order made at the special term, if it had been confirmed by the general term, might have been reviewed by this court on appeal. In this case we think the order made at the special term would not have been appealable, if it had been confirmed by the supreme court in general term; and in such a case, although a rehearing may be improperly denied by the supreme court, we are of opinion that there can be no appeal from the decision to this court.

Motion granted.

Grover v. Coon.

GROVER, *appellant*, vs. COON, *respondent*.

Where a writ of error was pending in the supreme court when the code of procedure took effect, and that court afterwards rendered judgment of affirmance, there is no right of appeal to this court, the determination of the supreme court being final under the provisions of the code.

A statute, which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect, is not unconstitutional.

C. P. Kirkland, for the respondent, moved to dismiss the appeal. Before and on the first day of July last a writ of error was pending in the supreme court, on a judgment of the common pleas affirming a judgment rendered by a justice of the peace, in an action commenced before him. On the 20th of July last, the supreme court, after argument, affirmed the judgment of the justice; and Grover appealed to this court from that determination.

John Clarke, for the appellant.

BRONSON, J. The 282d section of the code of procedure applies to proceedings subsequent to the first of July, in suits which were pending on that day. (*Supp. Code*, § 2.) The writ of error in this case was pending in the supreme court on the first of July, and was, we think, a suit within the meaning of the statute. The judgment of affirmance was subsequent to the first of July; and as the action was "originally commenced in a court of a justice of the peace," there was no right of appeal to this court. (§§ 282, 11.) The judgment of the supreme court was final.

We see no force in the objection urged by the appellant's counsel, that the statute is unconstitutional. The legislature did not take away a right of appeal which had already attached: they only said that for the future, no appeal to this court should be allowed in such cases.

Motion granted.

CASES
ARGUED AND DETERMINED
IN THE
COURT OF APPEALS
OF THE
STATE OF NEW-YORK,
IN DECEMBER TERM, 1843.

TEALL vs. FELTON.

Never may be maintained in the courts of this state against a postmaster for improperly detaining a newspaper, although such detention is under color of the laws of the United States and the regulations of the post office department.

The question, when the jurisdiction of the federal courts is exclusive and when concurrent with that of the state courts, considered.

A postmaster, who assumes to charge letter postage on a newspaper, in consequence of an initial being on the wrapper, does not act judicially in such a sense as to protect him from an action for improperly detaining such newspaper, although no fraud or malice be alleged or proved.

On error from the supreme court. Mary C. Felton, by her next friend Charles T. Hicks, sued William W. Teall in a justice's court, and declared in trover for converting one newspaper called the *Michigan Expositor*, of the value of six cents, and one newspaper wrapper of the value of six cents. The defendant pleaded the general issue, and the cause was tried by a jury. On the trial it appeared that the defendant was postmaster at the city of Syracuse; that the newspaper mentioned

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in the declaration came to that post office and was put into the box of Mr. Hicks, who demanded it of the postmaster in behalf of the plaintiff, and tendered the newspaper postage thereon, being one and a half cents. There was an initial upon the wrapper, and for that reason the defendant refused to deliver it until letter postage, fifteen cents, should be paid. The letter postage was marked at the Syracuse post office. One of the clerks in the post office testified that it was the general custom to charge letter postage on newspapers having on them a single initial. The defendant in the course of the trial objected to the jurisdiction of the court, which objection was overruled. After the plaintiff had rested, the defendant introduced in evidence a circular from the post office department as follows:

"To Postmasters. I am directed by the postmaster general to call your special attention to the multiplied and increasing attempts to violate the law and defraud the revenue by writing on the wrappers, margin or other portion of newspapers, pamphlets and magazines sent by mail. The cheap postage system has removed every reasonable excuse for violating or evading the law, and too much vigilance cannot be exercised by postmasters to detect and punish the offenders; and public sentiment, when well informed, will not fail to sustain you in the faithful discharge of this duty, which is as imperative upon you as any other. That frauds of this kind may be detected and traced to their origin, you are particularly instructed to stamp or mark in writing any transient (by which is meant all not regularly sent to subscribers) newspapers, pamphlets or magazines, with the name of the office and amount of postage. The wrappers of all such newspapers, pamphlets or magazines, when they have reached their destination, should be carefully removed, and if upon inspection, found to contain any manuscript or memorandum of any kind, either written or stamped, or by marks or signs made in any way, either upon any newspaper, printed circular, price current, pamphlet or magazine, or the wrapper in which it is enclosed, by which information shall be asked for or communicated, except the name and address of the person to whom it is directed, such newspaper, printed circular,

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price current, pamphlet or magazine, with the wrapper in which it is enclosed, shall be charged with letter postage by weight. If the person to whom the newspaper, printed circular, price current, pamphlet or magazine is directed, refuses to pay such letter postage thereon, the postmaster will immediately transmit the same to the office from whence it was forwarded, and request the postmaster thereof to prosecute the same for the penalty of five dollars as prescribed by the 30th section of the act of 1825. Suits may be brought either in district courts or before state magistrates having civil jurisdiction in actions of debt for this amount under the respective state laws. The name of the sender written or stamped either upon the newspaper, printed circular, price current, pamphlet or magazine, or the wrapper in which it is enclosed, communicates such information as subjects it to letter postage, and the consequential penalties, if such postage is not paid at the place of its destination.

• The diminution of the revenue of the department under the cheap postage system, and the great and increasing demand for additional mail facilities throughout the country, whose territory now extends to the Pacific, render it absolutely necessary not only that every cent of lawful revenue be collected and accounted for, but that the utmost vigilance should be exercised for the prevention of fraud, and the sure and speedy infliction of the proper penalty upon the offender.

This can only be accomplished by the strictest attention of postmasters, who are the sworn agents of the department, and bound to see the laws faithfully administered.

Post Office Department, Dec. 4, 1846.

W. J. BROWN, 2d Assistant Postmaster General."

The jury gave their verdict for the plaintiff for six cents damages, on which the justice rendered judgment. The common pleas of Onondaga county, on certiorari brought by the defendant, affirmed the judgment. The defendant then brought error into the supreme court, and that court sitting in the fifth district affirmed the decision of the common pleas. The opinion of the supreme court was delivered by GRIDLEY, J. as follows:

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GRIDLEY, J. We have no doubt that this action was properly brought in a state court. If a letter enclosing \$1000 in bank notes, had been sent by mail to the post office in Syracuse, directed to the plaintiff, and had been withheld by the postmaster, unlawfully, after a tender of the postage chargeable on the package, it is difficult to see why an action would not lie against the postmaster for a conversion of the money, in a state court. The injury is one for which the common law gives redress, and the party injured may seek his redress by the usual common law remedy, in any appropriate common law tribunal. The case is not one where the remedy is given by an act of congress, and is to be sought in the courts of the United States. So too, we are of the opinion that the conversion of a newspaper belonging to a citizen, authorizes an action of trover in the appropriate state tribunal, notwithstanding the party guilty of the conversion should be a postmaster. To justify such an action, however, the conversion should be clearly proved. The withholding of the paper should be shown to be without color of right, and the plaintiff should establish his title to it by unquestionable proof. This view of the case brings us to the consideration of the question whether there is any error apparent in the record for which we are authorized to reverse the judgment. This will depend upon the facts proved on the trial of the cause, or rather upon what we are bound to adjudge to be the facts of the case after the verdict of the jury.

By the act of 1845, (*Acts of 2d Session of 28th Congress, p. 24, § 1.*) the defendant was bound to charge with letter postage, not only letters in manuscript, but also "*a paper of any kind by or upon which information shall be asked for or communicated in writing, or by marks and signs,*" &c. Now it is quite clear that an initial may be so placed upon a paper as to convey information, and precisely such information as was intended to be prohibited by the act. For instance, a friend whose initial is known to his correspondent who may be travelling to a certain place in Michigan, may thus communicate to a distant person, the fact of his arrival. So also a distant correspondent may, by a paper which in itself contains nothing of

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importance, on which is inscribed his initial, communicate the fact of his friendly remembrance and recognition, and of his own good health. There are cases, therefore, in which a postmaster may only be doing his duty under the act, in charging such a paper with letter postage. And chap. 58, § 426, of the regulations for the government of the post office department, shows that it is immaterial whether the writing, or sign, or mark is on the paper or the wrapper. We have no doubt that the above is a sound though a severe interpretation of the act, when we consider the object for which it was passed, and the change in the phraseology from that employed in the act of 1825. But it is equally clear that an alphabetical character which would be an initial of some word or name, may often be found inscribed on the wrapper of a newspaper made carelessly and with no definite intent, or which may have been upon the paper used as a wrapper before it was employed for that purpose. In such a case the initial would be no evidence at all, that it was a mark or sign by which information was asked or communicated. Now we have no evidence in this return of the justice that this single letter was a capital letter; whether it appeared to be written by the same hand, or with the same ink and pen with the address on the wrapper, nor as to what position it occupied on the wrapper. Nor have we any evidence, whatever, to show by circumstances or otherwise, whether it was probably written by the person who sent the paper, to communicate information, or not. For aught we know, it was written with a different ink and pen and hand, and was placed in such a position on the wrapper, as to indicate that it was there by accident and not by intent. It is true that the evidence does not show that it was so, nor does it show to the contrary; and that is precisely the case where the law declares that every intendment and presumption is to be made in favor of and to uphold the verdict of the jury. If the facts are such as to indicate an intentional making of the letter by the same hand which wrote the address, that should have appeared on the return of the justice. (*See* 18 *Wend.* 141; 3 *John.* 435, 439; 2 *id.* 378.) The jury saw the witness and may have had op-

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portunities to arrive at the truth, which we have not. Hence the difficulty of setting aside a verdict when there is room for controversy about the facts.

We must hold, therefore, inasmuch as it may have been clearly an accidental mark, that the jury have found that it was so. This we feel bound to adjudge, while we can readily imagine that by means of a careless mode of trying the cause, or of an imperfect return, injustice may have been done to the defendant below.

S. D. Dillaye, for the plaintiff in error. I. The act, on account of which this suit was brought, was done by the plaintiff in error as postmaster, and in the regular exercise of his duties under the laws of the United States and the regulations of the post office department. For any, even an erroneous, exercise of his duties as such postmaster he was not amenable to the tribunals of the state of New-York. The state courts had no jurisdiction over the subject matter of the suit. (*Const. of U. S. art. 1, § 8; Post Office Laws of 1825 and 1827; Commonwealth v. Feely, 1 Va. Cas. 321; Sergeant's Const. Law, 279; United States v. Lathrop, 17 John. 8, 9, 10; Story on the Const. §§ 1124, 1632; McCullough v. The State of Maryland, 4 Wheat. 416; United States v. Cornell, 2 Mason's Rep. 60; Osborn v. Bank of U. S. 9 Wheat. 738; Slocum v. Mayberry, 2 id. 1; Federalist, No. 80.*)

II. In the absence of fraud or malice, which are not pretended or alleged in this case, officers required by the law to exercise their judgment are not answerable for mistakes of law or errors of judgment. (*Drew v. Colton, 1 East, 563 and note; Seaman v. Patten, 2 Caines, 312; Jenkins v. Waldron, 11 John. 114; Vanderheyden v. Young, id. 160; Cunningham v. Bucklin, 8 Coven, 185; Weaver v. Deavendorf, 3 Denio, 117.*) The act complained of was in its nature judicial, and the cases cited show that the plaintiff in error was not liable therefor.

III. The evidence on the trial clearly showed that there was an initial on the wrapper of the newspaper when it came to the

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Syracuse post office; and it should have been decided as matter of law that the plaintiff in error, in imposing letter postage, did no more than follow out the instructions from the post office department, and therefore that he was not liable.

B. D. Noxon, for the defendant in error, to sustain the jurisdiction of the state courts, cited *Bruen v. Ogden*, (6 *Halst.* 370, 377, 379, 381;) *Wilson v. McKenzie*, (7 *Hill*, 95;) *Story on Agency*, §§ 319, 319 *a*, 319 *b*, 320, 321, 322; *Cowp.* 754; 1 *Kent's Com.* 386. On the merits he insisted that the question was *one of fact purely*, as to which the verdict was conclusive. (18 *Wend.* 141; 1 *Hill*, 61; 3 *John.* 435, 439; 2 *id.* 378.)

WRIGHT, J. The first point taken by the plaintiff in error is, that if any action could be maintained against him, the defendant in error had not the choice of a forum, as the jurisdiction of the courts of the United States, in a case of this character, is exclusive. If this proposition be true, it is quite unnecessary for the plaintiff in error to come here to ask us to reverse the judgment, for it is utterly void.

This is undoubtedly a question of grave importance; for if the plaintiff in error be right, the state courts have been wrong ever since the adoption of the constitution of the United States; as the cases are almost without number, in which such courts, in the exercise of their ordinary, original and rightful jurisdiction, have incidentally taken cognizance of cases arising under the constitution, the laws, and treaties of the United States. (1 *Kent's Com.* 395.) In our own courts, officers of the government of the United States have been impleaded in actions of assumpsit, debt, trespass, &c. in which the defence set up was that they were acting officially under the laws of the Union. (*Ripley v. Gelston*, 9 *John. R.* 201; *In the matter of Stacy*, 10 *id.* 328; *Hoyt v. Gelston & Schenck*, 13 *id.* 141; *Wilson v. M'Kenzie*, 7 *Hill*, 95;) and in at least one case the supreme court of this state held that they had jurisdiction, and sustained a suit on a bond for duties given to a collector of the United States customs. (*United States v. Dodge*, 14 *John*

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R. 95.) I am not disposed to assume for the courts of this state the exercise of powers, concurrently or otherwise, clearly taken from them by the constitution of the United States ; nor a jurisdiction in *all* cases that may grow out of, and be peculiar to that instrument : but I think that to divest them of primitive jurisdiction, or pre-existing authority, the grant of power to the federal courts should be direct and exclusive, and the exercise of it by the state courts expressly prohibited. This was the construction given to the clauses of the constitution providing for the organization of the federal judiciary, cotemporaneous with its adoption, both by the national legislature and eminent expounders of it. (*Judiciary Act of 1789 ; Federalist, No. 82.*)

The first section of the third article of the constitution of the United States provides for the organization of a supreme court, and such inferior courts as congress may from time to time ordain and establish. This provision simply denotes the organs of the national judiciary. Were its construction extended further, "it would (as has been remarked by one of the eminent framers of the constitution,) amount to an alienation of state power by implication." (*Federalist, No. 82.*) The second section provides that "the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority ; to all cases affecting ambassadors, other public ministers, and consuls ; to all cases of admiralty and maritime jurisdiction ; to controversies to which the United States shall be a party ; to controversies between two or more states, between a state and citizens of another state, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects." This is a mere grant of jurisdiction to the federal courts, and limits the extent of their powers, but without words of exclusion, or any attempt to oust the state courts of concurrent jurisdiction, in any of the specified cases in which jurisdiction existed prior to the adoption of the constitution. The apparent

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object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary.

This doctrine of exclusive and concurrent jurisdiction growing out of the provisions of the third article of the constitution of the United States, was fully examined in the court for the correction of errors, in the case of *Delafield v. State of Illinois*, (2 *Hill*, 159,) and that court, with great unanimity, arrived at the conclusion, that the constitution had not, by its own force, divested the state courts of any of their former jurisdiction; and that a mere grant of jurisdiction to a particular court, without words of exclusion as to other courts previously possessing the like powers, will only have the effect of constituting the former a court of concurrent jurisdiction with the latter. See, also, *Federalist*, No. 82, in which a similar doctrine is maintained.

I will not contend that congress may not make the jurisdiction of the federal courts exclusive in cases affecting ambassadors, other public ministers, and consuls; or in cases of admiralty and maritime jurisdiction; or in cases growing out of, and peculiar to the federal constitution, and where the remedy is exclusively given by an act of the national legislature. In the latter cases congress may unquestionably provide that the remedy specifically given shall be pursued and enforced in the federal courts solely. But in many cases where the law of the Union prescribes the remedy, the power to pursue and enforce it in the state courts, is expressly given by congress. In cases where this has not been done, and there is no exclusive grant of jurisdiction to the federal courts, if the state tribunals are so organized as to afford redress, it may be obtained therein. I think that it is strictly true that in all civil cases where the common law affords redress, the party injured may seek it in a state tribunal, proceeding according to the course of the common law, and having jurisdiction of the person of the defendant, though he may be an officer of the federal government, and affect to act under a law of the Union. "The judiciary power of every government," says one of the distinguished authors of the *Federalist*, "looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation

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between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe. Those of Japan not less than of New-York may furnish the objects of legal discussion to our courts." (*Federalist*, No. 82.) I am aware that there are cases of federal cognizance, in which the state courts have not a concurrent jurisdiction. A sovereign state cannot be sued in the court of another state, neither could she be in the federal courts, but by agreeing expressly in the national compact to submit herself to their jurisdiction. Crimes against the government of the United States cannot be punished in the state courts, for every criminal prosecution must charge the offence to have been committed against the sovereign whose courts sit in judgment upon the offender, and whose executive may pardon him. (1 *Kent's Com.* 402.) Nor will the courts of this state enforce the penal laws of the United States, (*United States v. Lathrop*, 17 *John. R.* 9,) or of any other state. (*Scoville v. Canfield*, 17 *John. R.* 338.) But the want of jurisdiction in these cases depends upon principles older than the federal constitution, and wholly independent of it.

But the counsel for the plaintiff in error contends that this is a case which the state courts did not hold cognizance of at the adoption of the federal constitution, for the reason, that the post office department not only never in any manner or at any time, pertained to the state or colony, but is entirely the creation of the national statute: that it owes its existence exclusively to the constitution and national legislature, and hence, that the federal judiciary has exclusive jurisdiction in all matters growing out of, or pertaining to it. That the post office is a federal institution no one will deny; but it is difficult to perceive how the premises of the counsel sustain the conclusion at which he arrives. The same reason would apply with equal force in case of a suit being brought against a collector of the customs. The present action is one coeval with the common law, to enforce a right to property, alleged to have been wrongfully converted by the defendant. This remedy for a tortious conversion has always been complete in the state courts. It does not fol

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low that because the defendant may have been acting under a law of congress, in withholding the newspaper, and consequently may defend himself against the alleged conversion, that jurisdiction of the subject matter is exclusively given or acquired by the federal courts under such law. The plaintiff is not seeking redress under the post office laws, or attempting to enforce a penalty specifically imposed by them on the postmaster for a fraudulent act pertaining to his official duty. She simply seeks to recover in an appropriate common law tribunal, competent to afford a remedy, and in a form of action more ancient than the federal constitution or laws, the value of her property. If the defendant can maintain that by the post office laws, or any constitutional act of the national legislature, there was no legal conversion, his defence will be complete. But it is an incorrect conclusion, that because a law of congress prescribes the duties of an officer of the federal government, and in a proper case he may thereunder defend his acts, for such reason the state courts are ousted of jurisdiction. Upon the whole, I have no doubt that the justice had jurisdiction in the present case : and whilst asserting this jurisdiction, I would not be understood as inclined to throw the least obstacle in the way of a successful operation of the general government, or to encourage the exercise of state power having that tendency.

The remaining point of the plaintiff in error is, that the postmaster was required by law to judicially determine whether the initial on the wrapper of the newspaper, asked for or communicated information ; and that being compelled to act, he is not answerable for a mistake in law, or a mere error of judgment, unaccompanied by fraud or malice. The principle is well settled that a public officer, who is not a mere volunteer, but compelled to act in a judicial capacity, is not amenable either civilly or criminally, for a mistake in law, or error of judgment, when his motives are untainted with fraud or malice : and if it be true that the postmaster in this case was compelled to exercise his judgment in determining the object or purpose of the initial upon the wrapper, the judgment against him should be reversed. (*Drew v. Coulton*, 1 *East's R.* 563; *Seaman v. Pat*

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ten, 2 Caines' R. 312; *Jenkins v. Waldron*, 11 John. R. 114; *Weaver v. Devendorf*, 3 Denio, 117.) I have been unable, however, to arrive at the conclusion on this point, so confidently put forth by the counsel for the plaintiff in error. In the act "to reduce the rates of postage," &c. (*Laws of the U. States for 1845, chap. 43, § 1,*) this provision occurs: "In lieu of the rates of postage now established by law there shall be charged the following rates, viz: For every single letter in manuscript, or paper of any kind by or upon which information shall be asked for or communicated in writing, or by marks and signs, conveyed in the mail, for any distance under three hundred miles, five cents; and for any distance over three hundred miles, ten cents," &c. This is the only provision touching the question, and this it is insisted compels the postmaster, in all cases, in which a newspaper shall be conveyed through the mail, having writing thereon, or marks and signs, to judicially determine whether such writing, or marks, or signs, ask for or communicate information. In other words, that it is submitted to him as the sole judge in every case to decide the question of fact; and it follows of course that from his judgment there is no appeal. I see nothing in the law of congress that submits this question exclusively to his judgment; nor is the power within the general scope of his duties as postmaster. I think that if he assumes to determine, he does it at his peril. It is true that he is bound to charge the rates of postage prescribed on letters or papers, conveyed by the mail, of the description embraced in the act of congress. In a great variety of cases it would be obvious that the writing, marks, or signs, were used to ask for or convey information, and as a matter of fact a jury would not hesitate to come to that conclusion. In such cases the postmaster would be but doing his duty to charge letter postage. But there may be cases where the intent is not apparent, or the writing, mark or sign, may be on the newspaper or its wrapper, without a definite intent, or by accident. He is not made the exclusive arbiter to decide that such newspapers should or should not be rated with letter postage. When he does undertake to decide, it should be in a case in which the fact, if disputed,

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could be satisfactorily established. Whether a newspaper, by having writing or marks thereon, falls within the description authorizing it to be rated with letter postage, is a question of fact, and if disputed, must be determined in the same manner and by the same tribunals, that determine other questions of fact.

I confess that I see difficulty in many cases to successfully carry out the provisions of the act of congress. It might be impossible, many times, for jurors to satisfactorily determine whether an initial, or mark, found on a newspaper passing through the mail, was placed thereon with a definite intent. But this is no reason for the postmaster to assume judicial power. The national legislature can alone remedy the difficulty.

In this case the jury have found that the initial on the wrapper of the newspaper was there without any design of asking for or communicating information; that it was a mark thoughtlessly or accidentally made, or that it was on the paper prior to its being used as a wrapper, and hence that the paper did not fall within the description authorizing the postmaster to demand letter postage. From the return of the justice, no facts appear to indicate an intentional marking, nor are there any facts showing the contrary; and as the return does not purport to give the whole evidence, I think we must intend that the defendant failed to establish a defence, and that the facts proved justified the finding of the jury.

I am of the opinion that the judgments of the courts below should be affirmed.

Judgment affirmed.

Gilbert v. Wiman.

GILBERT vs. WIMAN and others.

In contracts of indemnity where the obligation is to perform some specific thing or to save the obligee from a charge or liability, it seems the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred.

But where the obligation is that the party indemnified shall not sustain *damage or molestation* by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained.

And in such cases a judgment recovered against the party indemnified, on account of the acts or neglect of another for which he is answerable, without payment of the judgment, or some part thereof, does not entitle him to sustain an action against the indemnitors.

A deputy sheriff and his sureties executed to the sheriff a bond, conditioned that the deputy should so demean himself in all matters touching his duty, that the sheriff should not sustain *any damage or molestation by reason of any act done or liability incurred* by or through such deputy. The sheriff was sued and judgment recovered against him for a default of the deputy in not returning an execution. Other judgments were also recovered against him and his sureties upon bonds given to discharge himself from arrest under attachments issued against him for not returning other executions in the hands of the deputy. No part of the judgments having been paid by the sheriff, and no actual damage being shown, *held*, that there was no breach of the bond of the deputy and his sureties, and that the sheriff could not maintain an action thereon.

THIS was an action of debt instituted in the supreme court by Jabez H. Gilbert against Stephen Luce, Gideon H. Woodruff, Truman Wiman and Lucas Van Schaack, upon a bond executed by the defendants in the words following, viz :

"Know all men by these presents, that we, Stephen Luce, Gideon H. Woodruff, Lucas Van Schaack, Truman Wiman, are held and firmly bound unto Jabez H. Gilbert, Esqr., sheriff of the county of Oswego, in the penal sum of ten thousand dollars, for which payment well and truly to be made to the said Jabez H. Gilbert, his executors, administrators and assigns, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this eleventh day of May, one thousand eight hundred and thirty-eight. The condition of this obligation is such that whereas the said Stephen Luce has been appointed to the

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office of deputy sheriff by the above named Jabez H. Gilbert, sheriff as aforesaid—Now therefore, if the said Stephen Luce shall so demean himself in all matters touching his duty as such deputy sheriff, that the said sheriff shall not sustain any damage or molestation whatsoever by reason of any act from this date done, or any liability incurred by and through said deputy, then this obligation to be void, otherwise of force.

STEPHEN LUCE, (L. S.)

G. H. WOODRUFF, (L. S.)

TRUMAN WIMAN, (L. S.)

L. VAN SCHAACK, (L. S.)”

The declaration assigned, as the first breach of the condition of the bond, that Luce as such deputy sheriff neglected to return an execution placed in his hands for collection, and that on account of such neglect the plaintiffs in the execution brought an action against the plaintiff in this suit, as sheriff, and recovered judgment against him for \$441.18. There was no averment that the plaintiff had paid any part of this judgment. In the assignment of the second breach it was stated that the said Luce neglected to return another execution placed in his hands, and that on account of such neglect the plaintiff, as such sheriff, was attached as for a contempt of court at the instance of the plaintiffs in the execution, and held in custody until he gave bail for his appearance to answer to the attachment; that he failed to appear on the return of the attachment, by reason whereof the bail bond became forfeited and was ordered by the court to be prosecuted; and that the plaintiff and his sureties in such bond were sued and judgment recovered against them; but there was no averment that any part of that judgment had been paid. The third and fourth breaches were substantially like the second, except that they related to other executions which the deputy had neglected to return.

The defendants Wiman and Van Schaack pleaded, among other pleas, that the said Stephen Luce had always well and truly demeaned himself in all matters touching his duty as such deputy sheriff, and that the plaintiff had not sustained any damage or molestation whatsoever by reason of any act done

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or liability incurred by or through the said Stephen Luce as such deputy.

The cause was tried before GRIDLEY, circuit judge, in July, 1845, and on the trial the plaintiff proved the execution of the bond declared upon, and the substantial truth of the matters averred in the assignment of the several breaches. The aggregate amount of the judgments recovered against the plaintiff, as such sheriff, mentioned in the several breaches, was shown to be \$2948,41, but there was no proof of the payment of those judgments, or any part thereof. It was insisted for the plaintiff, that he was entitled to a verdict for the penalty of the bond and to have his damages assessed at the amount of the judgments. For the defendant, it was insisted that without proof of the payment of the judgments, the plaintiff was entitled to nominal damages only, and so the circuit judge decided. To this decision the plaintiff excepted, and then submitted to a nonsuit with leave from the court and consent from the defendant's counsel to move for a new trial. A bill of exceptions was duly signed and sealed, on which the supreme court sitting in the fifth district granted a new trial. The following is the opinion of that court.

PRATT, J. The condition of the bond upon which this action is brought, is as follows, "that if the said Stephen Luce shall so demean himself, in all matters touching his duty as such deputy sheriff, that the said sheriff shall not sustain any damage or molestation whatever, by reason of any act, from the date of the said writing obligatory, done, or liability incurred by or through said deputy, then the obligation to be void." It is an undertaking to save the plaintiff harmless from all damage or molestation, by reason of any liability which might be incurred by him through the acts of said deputy; and the question on this obligation is, whether the sheriff, after proving a breach of such obligation, and a fixed liability for a certain sum, in consequence thereof against himself, can recover, without proving payment of the judgment, any more than nominal damages.

Perhaps there is no branch of law, concerning which the de-

cisions of our courts have been more fluctuating, than in relation to damages, especially in relation to the damages arising upon contracts, in the nature of contracts of indemnity. According to strict legal principles, a court of law, it would seem, should only give actual compensation for actual loss; and such is the rule in relation to contracts of indemnity against damages merely. (*Aberdeen v. Blackman*, 6 *Hill*, 324; *Jackson v. Post*, 17 *John*. 482.)

So as to covenants in relation to real estate, the courts have adhered to the same rule; for instance, in a covenant against incumbrances in a deed of real estate, although there should be found an incumbrance to twice the value of the land, nothing short of actual payment or eviction gives the grantee a right to recover any thing more than nominal damages. (*Van Slyck v. Kembal*, 8 *John*. 198; *Stannard v. Eldridge*, 16 *id.* 254; *id.* 122.) But in personal contracts, when the instrument deviates the least from a simple contract to indemnify against damage, even where indemnity is the sole object of the contract, and where in consequence of the primary liability of other persons, actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined towards fixing the rule to be one of actual compensation for probable loss; so that in contracts of that character, it may now be considered a general rule, both in this country and in England. (*Thomas v. Alden*, 1 *Hill*, 146; *Holmes v. Rhodes*, 1 *Bos. & Pull.* 638; *Hodge v. Bell*, 7 *T. R.* 93; *Post v. Jackson*, 17 *John*. 239.) For instance, in an action on a covenant, that a bond or other debt upon which the covenantee is liable shall be paid when due, or on a day certain, it has been long settled that the plaintiff may recover the full amount of his liability, although it is evident, from the terms of the contract, that it was intended merely as an indemnity, and although the parties, primarily liable, are abundantly able to pay. (*Mann v. Eckford's ex'rs*, 15 *Wend.* 502; *Ex parte Negus*, 7 *id.* 499; 7 *T. R.* 97; 2 *M. R.* 181.) Indeed, the late supreme court have gone so far, in some recent cases, as to allow a full recovery when it did not appear that the plaintiff was liable at all,

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or could be injured by a breach of the contract, the court deciding that they had a right to infer that the plaintiff had some interest in having the debt discharged, or he would not have made the contract. (*Thomas v. Alden*, 6 *Hill*, 146; *Tyler v. Ives*, *MS. Sup. Court*, 1839.) That the plaintiff had some interest in such a case, would be probable; but that he had an interest to the full amount of the original indebtedness, in the absence of proof, seems to be rather a violent presumption; such, however, is the effect of those decisions. In the last case cited above, Ives covenanted with Tyler that Raynor should pay up and discharge a bond and mortgage upon certain lands. There was no evidence to show that Tyler had any interest in the lands, or in the discharge of the bond and mortgage, or was in any manner liable upon the same; yet the court held that he was entitled to recover the full amount of the bond. So in an action on a bond for the jail liberties, the sheriff recovers the whole amount of the debt, on showing that he has been made legally liable, although he may never be called on to pay a penny—the creditor having it in his power to collect the amount of the original debtor, who may be perfectly responsible. (*Keep v. Brigham*, 6 *John*. 158; 7 *id.* 168.) So a contract of indemnity against liability is held to be broken when the liability is incurred, and the measure of damages is the full amount of such liability. (*Webb v. Pond*, 19 *Wend.* 423; *Rockfeller v. Donnelly*, 8 *Cowen*, 623; *Chace v. Hinman*, 8 *Wend.* 452.)

Whether the rule laid down in all these cases is not a departure from strict legal principles, it is not profitable now to discuss. It is said by a late writer on the subject of damages, "Any rule by which actual damages are given, where no actual loss is sustained, is in truth nothing but an effort to engraft on the courts of common law a species of specific performance, irregular and illegitimate, and which neither their forms of procedure nor the general arrangement of their system enable them to exercise without great danger of injustice and abuse. The rule should be considered cardinal and absolute, that actual compensation shall only be given for actual loss." (*Sedgwick on Damages*, 311.) However true these remarks may be in the abstract, and we admit their force, the rule is now settled

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by adjudication otherwise, and we are bound to follow it until it shall be changed by a superior court, or the legislature shall interpose. The obligation in this case may be classed among the contracts of indemnity against liability—in which cases the plaintiff is entitled to recover the amount of the liability incurred. (*Webb v. Pond*, 19 *Wend.* 423; *Rockfeller v. Donnelly*, 8 *Cowen*, 623; *Chace v. Hinman*, 8 *Wend.* 452; *Warwick v. Richardson*, 10 *Mees. & Wels.* 284; 2 *Starkie*, 167; 1 *Burr.* 574; 5 *Carr. & Payne*, 102.) And this is so, even where the contract is in form to indemnify against damages to be incurred in consequence of such liability. Indeed, in the case of *Rockfeller v. Donnelly*, which was in the court for the correction of errors, the decision of the court went much further than is necessary to sustain the plaintiff's claim in this case. Although the soundness of the principle adjudged in that case has been often questioned, yet it must be deemed to be law in this state, until it shall be overruled by a court of at least equal authority. The case of *Chace v. Hinman* seems to be directly in point. The condition in that case was, that the obligor should save harmless and indemnify the obligee against all damages, costs and charges to which he might in any way be subjected or become liable by reason, &c. It was objected that the plaintiff should prove payment before he could recover more than nominal damages. But the court held that the plaintiff was entitled to recover the full amount of the liability incurred. Leaving out the word "molestation," (upon which we shall have occasion to remark,) the undertaking in that case, and the one under consideration, appear to be in legal effect precisely the same. The liability in both cases was against the damages arising therefrom. We are unable to distinguish between them. We are aware that the soundness of the principle adjudged in that case was questioned by Chief Justice Bronson, in *Aberdeen v. Blackmar*, but he admits, and such is the fact, that it only carries out the principle decided in *Rockfeller v. Donnelly*. We are not aware that either of the cases have been overruled.

In this case the plaintiff, by the contract, was not only to be saved harmless from damages, but also from molestation. Now

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whether the commencement of a suit and the recovery of a judgment against the plaintiff, is molesting him within the strict sense of the term, no one will deny, we apprehend, that an arrest by an officer, under an attachment, is a molestation of no mild or trifling character, and such seems to have been the holding at the circuit, or the plaintiff could not have recovered nominal damages. It becomes us to inquire whether there were no other damages legitimately resulting in consequence of such arrest or molestation. The party is entitled to such damages as naturally flow from the breach complained of, the injury sustained, and that not the actual but the probable loss. The sheriff finds himself under arrest and is taken before the court and fined the amount of the execution, which his deputy neglected to return. It seems to us that this fine is a necessary result of the arrest, and should measure the damages. If there was any excuse for the deputy's negligence, by which the fine might be averted, it was the deputy's duty to interpose it. We assume, therefore, that there was no such excuse. Why then, as the fixed liability was the inevitable and immediate consequence of the molestation or arrest, should it not be the measure of damages, as well as in a suit on a bond for the jail liberties? In both cases there might be a possibility of collecting the debt of the original debtor. It is in the nature of a tort on the part of the deputy, and may be likened to a recovery against the principal for the negligence of his agent or servant. The judgment against the principal is the measure of damages in a suit by him against his agent or servant, whether he has paid the same or not.

In this case a bond was given, and the recovery against the sheriff was had on that bond. This was only a more circuitous way of arriving at the same result. The ultimate liability of the sheriff is the same, and inevitably follows the arrest, unless the sheriff should appear, and then he would only escape liability on the bond, by subjecting himself to a fine for the same amount. As the law now stands we think the plaintiff is entitled to recover the amount of the liability proved.

From the decision of the supreme court the defendants appealed to this court according to the judiciary act of December, 1847

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H. A. Foster, for the plaintiff. The plaintiff was entitled to recover the amount of the several judgments recovered against him; the circuit judge erred in deciding that he was entitled only to nominal damages; and the supreme court decided right in granting a new trial. When the obligation is to indemnify against damages and expenses, and the obligee has become absolutely bound and liable to pay the expense or damage, he may enforce his remedy on the obligation. (*Rockfeller v. Donnelly*, 8 Cowen, per Jones, chancellor, 639, 640; also per Spencer, senator, 657, 658, 659.) In *Rockfeller v. Donnelly*, the court for the correction of errors held, on a bond to save, defend and keep harmless the overseers of the poor and inhabitants of a town, of, from and against all costs, charges, rates, assessments, damages or expenses, by reason of the birth, education and maintenance of a bastard child, to be born, and of and from all actions, suits, troubles, damages and demands touching the same, that after the birth of the child and order of the justices directing the weekly allowance, an action could be maintained upon the bond by the overseers, to recover the weekly allowance to the time of the commencement of the suit, without having paid any part thereof.

Where a party has an indemnity not only against actual damages and expenses, but against any liability for damages or expenses, he need not wait to commence his suit until he has actually paid such damages; his right of action is complete, for the whole amount, when he becomes legally liable for them. (*Chace v. Hinman*, 8 Wend. 452; *Warwick v. Richardson*, 10 Mees. & Wels. 284; *Sparks v. Martindale*, 8 East, 593; *Wood v. Wade*, 2 Stark. Rep. 146; *Broughton's case*, 5 Coke's Rep. 24; *Rosse v. Pye*, Yelv. 207; *Cutler v. Southern*, 1 Saund. Rep. 116; 8 Watts, 157; 9 Yerger, 20; 1 Hen. & Mun. 459; 2 Bay, 145; 19 Wend. 423.)

In personal contracts, when the instrument deviates the least from a simple contract to indemnify against damage, even when indemnity is the sole object of the contract, where actual loss may be sustained in consequence of the primary liability of others, the decisions have gradually inclined toward fixing the rule to be one of actual compensation for probable loss.

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(See cases cited in the opinion of the supreme court.) Thus, in an action on covenant, that a bond or debt on which the covenantee is liable shall be paid when due, the plaintiff may recover the full amount of his liability. (*Ex parte Negus*, 7 Wend. 499; *Thomas v. Alden*, 1 Hill, 146; *Mann v. Eckford's Ex'rs*, 15 Wend. 502; *Hodgson v. Bell*, 7 T. R. 97; *Challoner v. Walker*, 1 Burr. 574; 5 Carr. & Payne, 102.) When a judgment has been recovered against the principal for the negligence or unskillfulness of the agent, he may maintain his action against the agent, if he had notice of the suit against the principal. (*Mainwarring v. Brandon*, 8 Taunt. 202.) And the verdict fixes the amount to be recovered. (*Dunl. Paley on Agency*, 7.) The rule is the same between master and servant. Upon an implied warranty of title to personal property, or false affirmation of ownership, by the vendor, when a recovery has been had against the vendee by the true owner, he may sue and recover against the vendor, before paying the judgment. (*Barney v. Dewey*, 13 John. Rep. 224; *Blasdale v. Babcock*, 1 id. 517.) A sheriff may recover on a bond for the jail limits, the amount of the debt, without actual payment by him; and yet it is only a bond to indemnify and save harmless. (*Janson v. Hilton*, 10 John. Rep. 549; *Barry v. Mendell*, id. 563; *Kipp v. Brigham*, 6 id. 158; 7 id. 168.) So he may recover against the debtor, who has escaped on final process, whereby the sheriff has become liable, before he has paid the debt. (*Sheriffs of Norwich v. Bradshaw*, Cro. Eliz. 53.) He may recover against the keeper of a lock-up-house, for the escape of a prisoner committed to his custody, upon his promise to keep him safely and save the sheriff harmless for any escape; and this even before suit against himself. (*Barkley and Gibbs v. Kempstow*, Cro. Eliz. 123.) He may also recover upon the bond of his under sheriff or deputy, for an escape on execution or for improperly discharging property attached on mesne process; although he has not paid the debt to the plaintiff. (*Norton v. Simmes, Hobert*, 12 (c.); *Cooper v. Mowrey and others*, 16 Mass. Rep. 5) On a bond by deputy to the marshal "to keep the marshal clear, free and indemnified," a breach that he failed to return executions

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(specifying them) is well assigned. (*Lewis v. Crockett*, 3 *Bibb*, 196.)

Geo. F. Comstock, for the defendants. The general rule in regard to contracts of indemnity is that *courts of law* can only give actual compensation for actual loss. The line which separates the jurisdictions of law and equity is here visible. In courts of equity, on the principle of *quia timet*, a party who is under a liability, and has a counter indemnity, can compel the indemnitor to perform specifically, so as to exonerate him from his liability. (2 *Story's Eq.* § 850; *id.* § 815; 6 *John. Ch.* 406.) Courts of law have no jurisdiction of this nature. They can only give compensation for actual loss; and this distinction between the two jurisdictions is founded in sound policy, and ought to be maintained. In the present case, it would be a specific performance of the defendants' contract for them to pay the creditors whose executions have not been returned, and thus exonerate the sheriff from his liability; but a court of law cannot call before it the necessary parties, nor are its powers and functions adapted to that result. The plaintiff may recover the sum demanded, but there is no guaranty that it will go to its proper destination—the satisfaction of the execution creditors; nor would such a recovery prevent the creditors from still enforcing their executions.

In all the cases where it is supposed courts of law have gone beyond the rule of compensation for actual loss only, it will be found on a careful examination that the contracts were very different from the one in question. They were affirmative engagements for the performance of some specific thing, and not to indemnify against loss or damage by reason of the non performance of the thing specified. Such are the cases referred to in the opinion of the supreme court, and such are all the cases of any authority cited on the other side. In *Rockefeller v. Donnelly*, the condition of the bond was to *save* the overseers against *all charges, &c.* This was construed as a condition that no liability should come upon the town. The decision of that case was also placed very much upon the intent and policy

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of the statutes under which the bond had been taken. In *Chase v. Hinman*, the condition of the bond was to indemnify against a liability, and the decision of that case can only be sustained upon the ground that the language used amounted to a condition that no liability should occur. But the principle of that case was disapproved in *Aberdeen v. Blackmar*, (6 Hill, 324,) and the case itself was overruled in *Churchill v. Hunt*, (3 Denio, 321.) In the cases of the bonds given for the jail liberties, (6 Johns. Rep. 158, 7 id. 168,) the condition was that the debtor should remain a true and faithful prisoner. Of course this was broken the moment the escape took place. The case of *Warwick v. Richardson*, (10 Mees. & Welsby, 284,) was in principle very much like *Rockfeller v. Donnelly*, already referred to.

In the case before the court, the condition of the bond is not to save or indemnify against a liability. It is that the sheriff shall sustain no damage or molestation by reason of liability, &c. In other words, it is simply a bond of indemnity against damage or molestation; and the well established doctrine in such cases is that actual loss must be shown. (*Cutler v. Southern*, 1 Saund. 116, n. 1; *Douglass v. Clark*, 14 John. 177; *Aberdeen v. Blackmar*, 6 Hill, 324; *Churchill v. Hunt*, 3 Denio, 321; *Sedgwick on Damages*, 311, 312, 314, 317, 318.) The word "molestation" adds nothing to the force of the bond. It does not mean a mere mental annoyance occasioned by a suit or attachment. Like the word damage, it refers to some actual pecuniary loss. Such is the construction it has always received in covenants for quiet enjoyment, where it usually occurs.

The circumstance that judgments have been recovered against the plaintiff on account of the default of his deputy, does not at all change the question. The sheriff became liable to the execution creditors the moment the deputy was in default, and he was no more than liable after the judgments were recovered against him. The only effect of the judgments was to change the onus of proof. They did not create the liability. If they were obtained upon due notice to the deputy and his sureties, they are conclusive evidence simply that the deputy

was in default, and of the amount of the sheriff's liability occasioned by such default. (*Per Bronson, J. in Aberdeen v. Blackmer, 6 Hill, 324.*)

GARDINER, J. delivered the opinion of the court. The principal question in this case is, whether the bond executed by Luce and his sureties is a mere bond of indemnity, requiring proof of actual damage, or whether it provides an indemnity against the liability of the sheriff on account of the acts done or omitted by his deputy.

The cases of *Rockfeller v. Donnelly*, (8 Cowen, 623,) and *Chase v. Hinman*, (8 Wend. 452,) have been relied upon, particularly the former, as decisive of this question. In the case first cited, the action was upon a bastardy bond, the condition of which was "to save, defend and keep harmless the overseers of the poor, and the inhabitants of the town, from and against all charges, damages and expenses, taxes, rates and assessments, for or by reason of the birth, education and maintenance of the child," then unborn. The two judges who delivered the prevailing opinion in the court of errors, agree that in its legal effect the instrument was a bond of indemnity against the charge to be created by the expected birth of a bastard child. (*Id.* 653.) The chancellor remarked, "the town was damnified by the 'charge' which was brought upon it by the birth of the bastard. The law imposes on the officers of the town the liability and duty of providing necessities for the infant, and it was against this legal obligation that the defendants bound themselves to indemnify the plaintiff." Senator Spencer remarked that "the condition was broken the moment the child was born, for then it became a charge upon the town." (*Id.* 653.) The construction given by the learned judges therefore to the bond in that suit was that it provided for an indemnity against a legal liability. The case of *Chase v. Hinman*, (*supra*,) was an action on a bond, the condition of which was that the obligor should "save harmless and indemnify the obligee against all damages, costs and charges, to which he might in any way be subjected, or become liable for," &c. No money was paid; and it was held by the court that by the

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instrument itself a distinction was obviously taken between damages actually sustained, and a *fixed legal liability* for such damages, and that the indemnity was against both.

The condition of the bond before us is as follows: "Now therefore, if the said Stephen Luce shall so demean himself in all matters touching his duty as such deputy sheriff, that the said sheriff shall not sustain any damage or molestation whatsoever, *by reason* of any act from this date done *or any liability incurred* by and through said deputy, then the obligation to be void." The distinction between the bond in question and those above mentioned, consists, I apprehend, in this, that by the former a "charge" or "fixed legal liability" is declared to be the injury from which the obligee is to be saved harmless. By the condition of the latter, the obligor stipulates that the sheriff shall not sustain any damage or molestation *by reason* of any liability, &c. By the former, he is to be saved from the thing specified. By the latter, from its consequences, or in other words, from the damage or molestation which may result from the liability.

The distinction is very important. It is recognized in the cases to which reference has been made, and in others, and will be found to pervade most of the authorities which have been cited. It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the non-performance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different. Thus, in *Kip v. Brigham*, (7 *John. Rep.* 168,) the condition of the bond was that the debtor "should remain a true and faithful prisoner and not escape; and that he should not at any time escape or go without the limits." The prisoner escaped, the very act to which the covenant applied, and it was held a breach, and the liability of the sheriff the measure of damages. The court, in 6 *John. Rep.* 159, say, it is true that the bond was *in effect* a bond of indemnity; but they nowhere intimate that the rights and remedy of the obligee in the two cases were identical. So in *Warwick v. Richardson*, (10 *Mees. & Welsby*, 284,) trust mo-

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neys were left by the testator in the hands of a co trustee to be used in trade. The latter executed a bond, the condition of which was to *save*, defend, and keep harmless the obligee from all suits, claims and demands, &c. prosecuted or *made* against him. A decree was obtained by the cestuis que trust against the plaintiff's testator for the trust money. The court say that the obligor in order to save the obligee harmless from *this claim*, ought to have invested the trust moneys pursuant to the will. Not having done so, the proper amount of damages is the amount to which the claim subjected the obligee. The obligee was to be saved *from any claim*. This was the act to be done. Its non-performance was the breach, and the legal liability of the obligor the measure of damages. The cases of *Thomas v. Allen*, (1 *Hill*, 145,) and *Churchill v. Hunt*, (3 *Denio*, 321,) are to the same effect.

Justice Beardsley states the obvious truth in *Churchill v. Hunt*, that upon obligations of this sort, the right of action becomes complete on the defendant's failure to do the particular thing he agreed to perform. Non-damnificatus cannot be pleaded in such cases, although it may be where the condition is to acquit the plaintiff *of any damage by reason* of the particular thing. (1 *Saunders*, 116, *n.* ; 1 *Hill*, 146.) It is believed that all the cases referred to by the learned judge of the supreme court whose opinion is before us, may be reconciled upon the principle above suggested. Here the defendant agreed that the plaintiff should not sustain any *damage*, which means actual damages, *by reason of any liability* incurred by the act of the deputy. The case is therefore within the principle stated in the note to *Saunders*.

The word molestation cannot enlarge the condition beyond what would be implied from the word damage. The former occurs frequently in covenants for quiet enjoyment, and against incumbrances. Nothing short of an eviction, or in the case of the latter covenant, the payment of money on account of the incumbrance, will entitle a party to recover, however much he may have been annoyed, troubled or molested. Indeed damage is much the most comprehensive word of the two ; molestation, if it has any legal meaning, being but a species of damage.

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The plaintiff having failed to establish a breach of the condition of the bond, was not in strictness entitled to nominal damage. But as the error can work no injury to the parties, a new trial must be denied.

New trial denied.

MOTT vs. PALMER.

The covenant of seisin is broken if the grantor at the time of the conveyance do not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself.

Accordingly where the grantor covenanted in the conveyance that he was the lawful owner of the premises and seised of a good and indefeasible inheritance therein, and a quantity of rails erected into fence standing on the premises was the property of another person by virtue of a previous agreement made with the grantor; *held*, that the grantee might maintain an action against the grantor for a breach of the covenant of seisin.

It seems that rails built into fence by a tenant, under an agreement that he may remove them from the land, are, as between such tenant and the owner of the soil, personal property.

PALMER brought an action of covenant against Mott in the common pleas of Columbia county, in which court the cause was tried in October, 1846. The case was this: On the 25th of December, 1841, the defendant conveyed to the plaintiff certain premises situated in Chatham, Columbia county, covenanting in the conveyance that at the delivery thereof he was the *lawful owner of the premises granted, and seised of a good and indefeasible estate of inheritance therein clear of all incumbrance*. A quantity of rails erected into a fence which stood on the premises at the time the deed was executed was not in fact the property of the grantor, but belonged to one Brown, the owner of adjoining lands. Brown had cut the rails from his own land and built the fence in 1840, under an agreement with the defendant by which he was to enclose temporarily a part of the defendant's land and occupy it as tenant, *with leave to remove the rails whenever he saw fit to do so*. Under this agreement Brown occupied that part of the land in the season of 1841, and it was enclosed by the fence in question when the above deed was executed. The plaintiff, after his purchase

1	564
113	89
1	564
116	508
1	564
122	490
1	564
124	218

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the premises, went into possession, and in the year following took the rails and converted them to his own use, and for this he was sued by Brown in a justice's court, and judgment recovered against him for the value of the rails. The defendant Mott was present on the trial of that suit and was sworn as a witness. It was claimed on the part of the plaintiff that these facts constituted a breach of the covenant of seisin, inasmuch as the fence in question was at the time the conveyance was executed the personal property of Brown. The defendant's counsel requested the court to charge the jury, that if the fence was the personal property of Brown at the date of the deed, the plaintiff could not recover for a breach of the covenant of seisin, but that his remedy would be an action on the case. The court refused so to charge, and instructed the jury that if they found the facts to be as they are above stated, the plaintiff was entitled to recover the value of the rails. The defendant excepted. The jury found a verdict for the plaintiff, on which judgment was rendered. The supreme court sitting in the third district affirmed the judgment, and the plaintiff brought error to this court.

N. Hill, Jun. for the plaintiff in error. To entitle the plaintiff below to recover, it must be shown that there was, at the time of giving the deed, an outstanding estate in some third person of freehold at least, so as to interfere with the grantor's power of conveying and transmitting by descent. (4 *Kent's Com.* 386, 7; 1 *Hill. Abr.* 104, note; 2 *Wend.* 166.) It cannot be pretended that Brown had such an estate. His right was that of a tenant for a short period, with the privilege of taking away, when he left, the rails he had placed upon the land to enable him to use it. Neither this outstanding tenancy, nor any of the incidental privileges connected with it, interfered with the *estate* of the grantor, so as to divest his seisin.

The action is unprecedented and anomalous. No trace of any thing like it can be found in the books. It proceeds upon a course of reasoning which finds no countenance in the cases hitherto decided. The declaration itself is necessarily incongruous and absurd. It admits that the grantor was properly

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seised of the land described in the deed, and then asserts that the rails in question were *part and parcel of and attached to the soil and freehold*. If this allegation is true, the plaintiff below acquired a valid title to the rails; and his right of recovery, therefore, must be established, not by *proving* what he has thus far alleged, but by *disproving* it. The declaration, however, alleges further, that the grantor, though duly seised of the soil and freehold, was *not seised of an indefeasible estate of inheritance in the rails*, and then proceeds to show that they were the *personal property of Brown*—a species of property which the deed does not purport to convey.

It is not true that the covenant of seisin extends to every thing which would pass under the deed as between vendor and vendee where no right of a third person intervenes. As between vendor and vendee, a deed like the one in question purports to transfer not only the unqualified property in the soil, but the exclusive right of using it. And yet it is settled that a public highway over the land, which implies an outstanding right to cut down trees, dig up the soil, and exclude the grantee from the beneficial enjoyment of it, is no breach of the covenant of seisin. (15 *John. Rep.* 481.) Outstanding rights of this nature, as the right to pasture cattle on the land, (5 *Conn. Rep.* 508,) to take water from it, (15 *Pick.* 66, 68,) to dig turf, &c. upon it, (5 *Conn.* 508, 9,) are within the covenant against *incumbrances*, but are not reached by the covenant of *seisin*. (See 1 *Hill. Abr.* 394; 2 *Mass. Rep.* 97; 3 *New Hamp. Rep.* 335; 10 *Conn.* 422; 19 *Maine Rep.* 313.) So as to every thing constituting a burthen upon the estate, and affecting its value, without changing its essential character; as an outstanding right to have dower in the land, (22 *Pick.* 447, 8; 10 *John. Rep.* 266,) or to occupy it as tenant for years. (2 *Speer's Rep.* 649.)

It may be said that if this action is not maintainable, purchasers may be misled and defrauded, without the means of redress. If this were so, it would not furnish an adequate reason for extending the covenant of seisin beyond its appropriate limits. Upon the principle of the cases above cited, the covenant against

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incumbrances seems to be the only one applicable to an outstanding right to enter and remove rails or other things from the land. But conceding that no remedy exists upon the covenants in the deed, this does not prove that the purchaser would be remediless. If he has been misled through mistake or fraud, a court of equity would set aside the transaction and compel a restoration of the purchase money. (2 *Paige*, 84, 91, 2; *Story's Eq.* § 140 *et seq.*) And in cases of fraud, even a court of law would furnish adequate redress in an action on the case for damages. (1 *Day*, 250; 2 *Cain. Rep.* 193; 2 *Bibb's Rep.* 583; 13 *Johns. Rep.* 325; 5 *Day's Rep.* 439; 6 *Shepl.* 419, 424; 23 *Wend.* 260; 17 *id.* 193; *Georgia Rep. part 2*, p. 112.)

J. H. Reynolds, for the defendant in error. The rails being made into fence, on the premises covered by the deed, were as between Mott and Palmer a part of the realty, and would have passed by the deed had Mott owned them. (*Goodrich v. Jones*, 2 *Hill*, 142; 2 *Wooddeson's Lec.* 379; 2 *Kent's Com.* 346, n.; *Walker v. Sherman*, 20 *Wend.* 639; *Middlebrook v. Corwin*, 15 *id.* 169.) And Mott having assumed by the deed to convey them as real estate, is estopped from denying that they were a part of the realty as between him and his vendee. (*McCarty v. Leggett*, 3 *Hill*, 134; *Abbott v. Allen*, 14 *John.* 248; *Greenly v. Wilcox*, 2 *id.* 1; *Hamilton v. Wilson*, 4 *id.* 72; *Sinclair v. Jackson*, 8 *Cowen*, 553; *Jackson v. Bull*, 1 *John. Cas.* 90; *Jackson v. Stevens*, 16 *John.* 110; *Dezell v. Odell*, 3 *Hill*, 215; 2 *Atk.* 228, 383, 558.) There being no reservation in the deed, of the fence in question, every thing appurtenant to the soil *prima facie* passed by the deed as between Mott and Palmer. It was as between them treated as real estate, and the rails or fence in question would have passed had Mott owned them. Mott covenanted that he owned *the premises and every part thereof*. These rails made into fence were a part thereof, as between grantor and grantee, and the covenant of seisin operated as much upon them as upon the soil itself. (*Austin v. Sawyer*, 9 *Cowen*, 39; *Holmes v. Tremper*, 20 *John.* 30; *Muller v. Plumb*, 6 *Cowen*, 665; *McClintock v. Graham*, 3 *Mc-*

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Cord, 553; *Fairis v. Walker*, 1 *Bailey*, 540; *Isham v. Morgan*, 9 *Conn. R.* 374; 2 *Kent's Com.* 342.) If Mott had covenanted in express terms that he owned the particular fence in question, there could be no doubt that an action for the breach of that covenant could have been maintained if the title had failed. By the deed from Mott to Palmer the fence in question was as much embraced in it and as much a part of the premises conveyed as if it had been conveyed in express terms; for there being no reservation in the deed, every thing appurtenant to the premises was covered by the deed as between vendor and vendee. (*Platt on Cov.* 306; 11 *East*, 642; *Holmes v. Tremper*, 20 *John.* 30; *Isham v. Morgan*, 9 *Conn.* 374; *Kittredge v. Woods*, 3 *N. Hamp. R.* 503; *Parsons v. Camp*, 11 *Conn.* 525; 5 *Greenl.* 222; 15 *Wend.* 169; 21 *Pick.* 367.)

The defence set up by the defendant and the evidence offered to sustain it was in its effect an effort to vary by parol the legal import of the deed; to restrict its terms so that it should not operate upon what in fact and in judgment of law was a part of the premises described in the conveyance. The covenant operated upon every thing which would have passed by the deed if Mott had been the owner. The effort therefore to show that the fence was mere personal estate, and that in consequence of its being personal estate was not covered by the deed or embraced in the covenants, was in effect contradicting its terms, and limiting and restricting its legal effect by parol, and was therefore inadmissible. (*Austin v. Sawyer*, *supra*; *Isham v. Morgan*, 9 *Conn.* 374; *Suydam v. Jones*, 10 *Wend.* 180; *Stevens v. Cooper*, 1 *John. Ch.* 429; *Champion v. Storrs and White*, 5 *Cowen*, 509; *Jackson v. Croy*, 12 *John. R.* 427; *Child v. Wells*, 13 *Pick.* 121.)

RUGGLES, J. In December, 1841, Mott conveyed to Palmer a farm of land in Columbia county, by a deed containing the following covenant:

"And the said Philander Mott doth hereby covenant and agree that at the delivery hereof he is the lawful owner of the

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premises above granted, and seized of a good and indefeasible estate of inheritance therein clear of all incumbrance."

This action was brought by Palmer, the grantee, on the covenant in the deed, to recover the value of a rail fence which stood on the land when the deed was executed, but which did not belong to Mott the grantor. The facts were, that the fence was erected on Mott's land in 1840 by one Brown, (who owned the adjoining land,) under an agreement between him and Mott, by which Brown was to fence in, temporarily, a part of Mott's land with his own, and to cut and take away the grass growing on Mott's land; with leave to take away the fence whenever he liked. After Mott conveyed to Palmer the land on which the fence stood, Palmer removed the fence and converted it to his own use. Brown thereupon sued him before a justice for the fence and recovered, Mott being a witness on that trial against Palmer. Although the evidence to prove these facts was at first offered by Palmer on the trial of this cause in the court below and rejected by the court, it was afterwards given by the defendant Mott.

The question now is whether in this action brought by Palmer the grantee against Mott his grantor, on the covenant of ownership and seisin in the deed, Palmer is entitled to recover the value of the fence. A grantor who executes a conveyance of land undertakes to convey every thing described in his deed; and by a covenant of seisin he assumes to be the owner of all he undertakes to convey. The deed in question purported to "grant and convey all that certain lot or farm of land situate in the town of Chatham, county of Columbia, bounded &c. with the appurtenances," &c. The word land, when used in a deed, includes not only the naked earth, but every thing within it, and the buildings, trees, fixtures and fences upon it. (*Goodrich v. Jones*, 2 *Hill*, 143; *Walker v. Sherman*, 20 *Wend.* 639, 640, 646; *Green v. Armstrong*, 1 *Denio*, 554; *Com. Dig. Grant, E.*; *Co. Litt.* 4 *a*; 2 *Roll.* 265.) A deed passes all the incidents to the land as well as the land itself, and as well when they are not expressed as when they are. Fixtures belonging to the owner of the land, being part of the

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land, cannot be reserved by parol when the land is conveyed; the deed conveys them to the grantee unless the reservation be in writing. (*Noble v. Bosworth*, 19 *Pick.* 314.) If the fence had belonged to Mott, it would have passed by his deed; not by force of the word *appurtenances* contained in the deed, but without that word, and as part of the land. Trees, buildings, fixtures, and fences on a farm, are corporeal in their nature, and the subjects of seisin, like the land itself of which they are regarded in the law as a part. Fences are perishable by the effect of time, and so are trees and houses; but indestructibility is not one of the essential attributes of real estate. Fences are not only indispensable to the enjoyment of real estate, but they are, in their nature, real estate, to the same extent that houses and other structures on the land are so. A rail, before it is used in the construction of a fence, is personal property, and so is a loose timber before it is used in the construction of a house. When either is applied to its appropriate use in building a fence or a house, its legal nature is changed. It becomes real estate, and is governed by the law which regulates land, descending to the heir as part of the inheritance, and passing by a deed as part of the freehold. A fence may be easily detached from the earth, but not more easily than the stones which lie on its surface, and both are part of the land, and therefore it is that a building or fence belonging to the owner of the land will pass by his deed of the land without being expressed or designated as part of the thing granted.

But the earth within specified boundary lines may be owned by one man, and the buildings, trees and fences standing on it by another. A man may have an inheritance in an upper chamber, although the title to the lower buildings and soil be in another. (*Shep. Touch.* 206; 1 *Inst.* 48, b.) And it is a corporeal inheritance. (10 *Vin.* 202.) Buildings and fixtures erected by a tenant for the purposes of trade belong to him, and are removable without the consent of his landlord. (*Holmes v. Tremper*, 20 *John.* 30; *Miller v. Plumb*, 6 *Cowen*, 665; *Doty v. Gorham*, 5 *Pick.* 489.) *Herlakenden's case*, (4 *Co. R.* 63,) affords an instance in which one man owned the land

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and another the growing trees upon it. In *Rogers v. Woodbury*, (15 *Pick.* 156,) Putnam, J., in speaking of a house which a man had erected on land which did not belong to him, said "it might or it might not be parcel of the realty. If the owner of the land owned the buildings, it would be so. If he did not, and the owner of the building had no interest in the land, the building would be personal property." *Smith v. Benson*, (1 *Hill*, 176,) was the case of a dwelling house and grocery belonging to one man, although standing on the land of another; and in *Russell v. Richards*, (1 *Fairf.* 431,) the owner of land on which another man had erected a saw mill by his consent, executed a deed for the land and the mill, but it was held that the conveyance passed no title to the mill, because it was the property of him who built it. The conclusion derived from these cases against the plaintiff's right of recovery on the covenant is, that the defendant's deed purports to be a grant of real estate only, and the fence in question being personal property was not a part of the premises granted, and therefore not within the scope of the covenant which relates to the realty only.

If this be a sound conclusion, a grantor could not be made liable on the covenants in his deed, although he had previously and privately sold, with a view to removal, all the houses, buildings, mills, fences, and growing timber on the land conveyed. Indeed, if this doctrine prevails, the gravel, clay, stone and loam, might also be converted into personal property by such a sale, and carried off the land; without violating the grantor's covenant. Let us test the correctness of this conclusion in a few words. It is true the fence in one sense was not a part of the thing granted. It did not pass by the deed. In the same sense, if some stranger had been the owner of one half the farm, that half would not have been part of the thing granted, because it would not have passed by the deed. But the fence was *within the description* of the thing granted as clearly as the land itself; and being within the description, it was a part of that which the deed purported to convey, and of which the grantor covenanted that he was the owner. If it be yet doubted whether the fence (being in fact the personal property of Brown) was

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within the description of what the grantor professed to convey, that doubt can be solved in a moment, by reflecting that it would undeniably have passed by the deed if the grantor had been the owner of it; although it could not have so passed if it had not been within the description.

It all comes to this: The grantor undertook to convey it as part of the realty by a deed which would have been effectual for that purpose if he had been the owner of it, as by the deed he professed to be, but was not. It is therefore a case in which the covenant of seisin affords a remedy; and although the amount in controversy is trifling, the right is clear; and it seems to be perfectly just that the grantor should pay for the fence, because there is nothing in the case to show that Palmer, when he accepted the deed, was informed by Mott or otherwise knew that it belonged to Brown.

The judgment of the supreme court must therefore be affirmed.

BRONSON, J. The fence in question stood on the land which the defendant conveyed to the plaintiff; and, as between vendor and vendee, was a part of the thing granted. (*Goodrich v. Jones*, 2 Hill, 142; *Thayer v. Wright*, 4 Denio, 180; *Green v. Armstrong*, 1 id. 554.) There is no more doubt of this, than there is that the trees, herbage and buildings on the land, or the mines and quarries in it, passed by the deed.

It is undoubtedly true that the soil may be owned by one man, and the fences and buildings by another; and as between such owners, those structures will be regarded as personal property. But in their nature, fences and buildings, like every thing else attached to the earth, are real estate, and will pass with the soil to the heir or grantee. It is truly said that rails are not in their nature real property. But a fence, though constructed of rails, is in its nature real property. It is just as plainly so as is a house. Both are made of materials which were once personal property; but they become real when formed into a structure attached to the soil. The word land includes not only the soil, but every thing attached to it,

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whether attached by the course of nature, as trees, herbage and water, or by the hand of man, as buildings and fences. This is but common learning; and there is no more room for question that a grant of land, *eo nomine*, will carry buildings and fences, than there is that it will carry growing trees and herbage upon, or mines and quarries in the ground. This is probably the first time the suggestion was ever made, that the purchaser of a farm must have the fences mentioned in the deed, either for the purpose of acquiring a title to them, or having that title secured by the covenants in the conveyance.

The fact that buildings and fences may be owned by a different person from the one who owns the soil, has no tendency to show how much the defendant attempted to convey. That must be settled by the deed; and the deed just as plainly goes to the structures attached to the land, as it does to trees, mines and quarries.

It is said that the fence was not included in the grant, because the defendant did not own it. That argument proves too much. It proves that nothing was granted, if the defendant owned nothing which he professed to convey. And it turns the covenant of seizin into nonsense; for it will have no operation, except where it is of no use, to wit, where the grantor owned the thing granted.

It is true that ejectment cannot be brought for a fence after it has been severed from the freehold, and become personal property. And it is no less true that ejectment cannot be brought for trees, buildings or ores under the like circumstances. But the argument does not prove but that all these things are real property before the severance takes place.

The covenant of seizin, when in the usual form, goes to the title; and is broken the moment it is made, if the vendor had not the lawful title to the property granted, and to every part of it. In this case the defendant covenanted, that he was "the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein." The covenant extended to the whole of "the premises;" and included the fences, as well as the trees, buildings, mines, quarries, and

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other things which were granted by the deed. As to the fence, and the rails of which it was composed, the defendant had no title; he was not the owner; the property belonged to Brown. The covenant was as plainly broken, as it would have been had Brown owned the house and barn, or a coal mine or ore bed in the land. Notwithstanding the zeal with which the contrary doctrine was urged, no authority was produced in support of it. Cases were cited to show, that a mere lien or incumbrance, as a judgment or mortgage; or an easement, as a way, over the land; none of which divest the title; do not constitute a breach of the covenant of seizin. (*Sedgwick v. Hollenback*, 7 John. 376; *Whitbeck v. Cook*, 15 id. 483.) Such cases are very far from proving, that the covenant is not broken where a part of the thing granted was not owned by the covenantor, but was owned by another.

It was a matter of no importance how Brown acquired title to the rails. It was enough that he owned them.

That parol evidence was inadmissible to control the legal effect and operation of the deed, is too plain a proposition to be disputed. If the plaintiff had been told at the time that Brown owned the rails; and more, if the rails had been expressly excepted by parol from the operation of the grant and covenant, it would have been no answer to the action. (*Townsend v. Weld*, 8 Mass. R. 146; *Noble v. Bosworth*, 19 Pick. 314; *Suydam v. Jones*, 10 Wend. 180; *Champion v. White*, 5 Cowen, 509; *Jackson v. Russell*, 12 John. 427.) A deed cannot be contradicted in its legal effect, any more than it can in its terms.

I am of opinion that the judgment is right, and should be affirmed.

JOHNSON, J. There is no reservation of the fence or rails in question in the deed. It purports to convey the entire premises; every thing that usually passes with the land and as part of it as well as the land itself. The covenant alleged to have been broken is as broad as the grant, and by it the grantor covenanted with his grantee that he was lawfully seized of an estate of

inheritance in and had good right to convey every thing which the grant purported upon its face to operate upon. *Prima facie* the rails which were then lying in a fence upon the land were part of it and passed by the deed as land, with the seizin in fee in the vendor guarantied by the covenant.

But it is said that this fence in fact was not part of the freehold ; that having been built by a tenant under an agreement that it might be removed, it was mere personal property and did not pass by the deed : and the argument assumes that if it was not a part of the realty and would not therefore pass by the deed, the covenant of seizin did not extend to it. But it is no answer to say that because the grantor had no title, and could grant none, to what upon the face of his deed he undertook to convey, the covenant of seizin does not therefore apply to it and is not broken. The same answer might be given with equal force in regard to the title to the soil itself. It is not so much a question as to whether the title to the rails did actually pass under the deed, as it is conceded that they did not : and if they had there would clearly have been no breach. But it is more properly a question what upon the face of the instrument and by its terms the grantor undertook to convey and to covenant that he was seized of. The undertaking is one thing and its effect upon the subject matter of the undertaking and the rights of the parties under it quite another. And it is precisely because the grantor undertook to convey and to be the owner of that to which he had no right, and could convey none, that the action lies if it can be sustained at all. If the covenant of seizin shall be found to apply to things of this nature in ordinary cases between grantor and grantee, it seems to me quite clear that the defendant in error must recover.

It was strenuously urged by the counsel for the plaintiff in error that the covenant of seizin does not apply to any thing in the nature of fixtures or appurtenances which may or may not belong to the freehold, according to extraneous facts or circumstances ; that by it the grantor only covenanted that he was seized of a freehold estate in the premises, and that no other person had such an estate therein ; and that the covenant had

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no application to any estate or interest in the premises less than a freehold. Before we adopt this doctrine as applicable to such things as usually pass by a conveyance as part of the realty, we must be careful to see the consequences to which it might lead. It has been well held that a highway regularly laid out running across land at the time of the grant was no breach of the covenant of seizin, because notwithstanding the easement the grantor was well seized of the title to the land and had good right to convey. (*Whitbeck v. Cook*, 15 *John*. 483.) But that is not this case. The want of seizin, of a right to convey, (which did not exist in that case,) is the very cause here alleged. It must be quite obvious, I think, that if a party under the circumstances of this case has no remedy under his covenant of seizin he must remain entirely remediless as regards his deed, because no other covenant is at all applicable. Under the covenants of warranty and for quiet enjoyment there must first be an eviction; and I think no one will seriously contend that the covenant against incumbrances has an application in any sense. Even conceding—which I do not—that the existence of a public highway or other easement is an incumbrance, it would not affect this case. Were the rule contended for the true one, it might and doubtless often would happen that a party holding premises under a deed with full covenants would have his premises stripped of buildings, fences, and every thing valuable belonging to the estate, and yet have no remedy against his grantor upon any covenant in the conveyance.

No one, I believe, has ever yet thought it necessary to require the grantor to insert a special covenant in his conveyance that he was seized and had good right to convey the buildings, fences, standing trees and growing grass upon the premises covered by the grant, and for the obvious reason that the covenant of seizin has hitherto been regarded as a sufficient protection against a want of title in the grantor, to any of these essential and often by far the most valuable portions of the premises purchased. The novelty of such a special covenant in a deed at this day would be a strong argument against its necessity. These personal covenants in our conveyances of real estate

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have been framed with great care and proved by long experience ; and it can hardly be conceived that they have hitherto failed to protect parties or to give them a sufficient remedy in case of the loss of such valuable interests.

The ordinary covenant that the grantor is seized in his own right and has power to convey the premises granted must, it seems to me, be construed to extend to every thing attached to the soil that usually passes by deed as real estate, as fully as though the specific thing were named, or a covenant framed for it by itself ; and such, I think, has been the general understanding of courts and conveyancers.

WRIGHT, J. and GRAY, J. were also for affirming the judgment.

GARDINER, J. dissenting. The argument by which the rails in question are converted into real estate, in order to bring them within the purview of the grant of the defendant, is substantially as follows. Rails made into fence and attached to the freehold become part of the land. The rails in question were made into fence and attached to the land conveyed to Palmer. Therefore as between vendor and vendee, Brown's rails were a part of Mott's land : and it being admitted that Mott the defendant neither owned the rails nor "was seized of an indefeasible estate of inheritance therein," at the delivery of the deed, he is liable for breach of his covenants. This is plausible. The infirmity of the syllogism consists in what logicians call the *petitio principii*. It assumes the very point in issue, namely, that the rails in question were attached to the land so as to become parcel of the premises. This proposition, which is indispensable to the maintenance of the action, is not only unsupported by proof, but was conclusively disproved by the evidence. Brown, the tenant, swore "that he cut the rails upon his own lands, and put them in fence upon Mott's land for the purpose of cutting a piece of grass upon the premises, under an agreement with Mott that if he would build the fence there he might move it off whenever he pleased."

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The question is, were these rails, under the circumstances, attached to the freehold? Is there not something of an absurdity in asserting that the property of one man placed upon the land of another with the unlimited right of removal becomes thereby a part of the inheritance? The assumption, it is believed, has no foundation in principle or authority. Rails upon a fence are constructive fixtures. (3 *Kent's Com.* 347, *n.*) They are in their own nature personal property, and become parcel of the realty, as the term fixture imports, in virtue of their annexation to the land. (*Id.* 345, *n.*) The annexation which will convert personal into real estate, is not affected by placing the chattel upon or even by affixing it to the land: it must be fixed to the freehold *perpetui usus causa*. (*Id.* 347 and note; *Walker v. Sherman*, 20 *Wend.* 647, 655; 3 *Dane's Abr.* 156; 4 *Adol. & Ellis*, 884.) Hence, if the annexation is made by virtue of a contract with the owner of the land for the purposes of trade, (3 *Kent*, 345; 2 *R. S.* 83, §§ 6, 7, 8,) or of agriculture, (*Whiting v. Brastow*, 4 *Pick.* 310,) the chattel does not become a part of the freehold, but remains personal property. In this case, the fence was built for the purpose of cropping a part of the land under a contract with the owner which secured to the tenant the right to remove it at pleasure. The rails of which it was composed were never attached to the freehold, and were consequently personal property at the time of the conveyance to the plaintiff. And the covenant of seizin could have no more application to them, than to the vehicle by which they were transported to the premises.

Again, it was urged that the grantor was estopped from denying that the fence which was upon the premises in question and apparently attached thereto, was parcel of the land conveyed. This was the view taken by the judge at the trial, who ruled accordingly. If the defendant was estopped, it must be upon the ground of his grant or his covenant, or both. But the grant is of *land*, and the defendant covenants that he owns the *land described*, and is seized of an estate of inheritance therein. He declares by his covenant, that all *the land*, in other words all *that is land* within the bounds given in the

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deed, he owns and has in it an estate of inheritance. It is a palpable perversion of such a contract to turn it into a warranty that every thing *upon* the land (which would pass with it if attached) is in fact a part of the freehold. No authority sanctions such a principle. We have been referred to cases in which it has been held that crops growing pass to the vendee as incident to the land, and that the vendor is not permitted to contradict the effect of his deed by setting up a parol exception at the time of the conveyance. But in all these cases, the property sought to be exempted from the operation of the grant was the property of the vendor attached to or appurtenant to the land. Crops will thus pass; so also will a right of way; but if either be severed from the land prior to its conveyance, by sale or release, the vendor is not estopped from showing the fact, nor is he liable upon his covenant of seizin. He is owner of the land and seized thereof notwithstanding the severance. The ownership of the property determines its character, whether it is part of the freehold, or an appurtenance, or a mere chattel. (4 Kent, 468.)

It has been held in effect that a grant of liberty to dig turf, or of the herbage, (*Com. Dig. tit. Grant*), or of an easement, as the right of way, (2 R. S. 90,) or of particular trees, (4 Coke, 63,) although made prior to the sale of the land, is not a breach of the covenant of seizin. The reason is assigned by Coke—"for these passed to the first grantee but a particular right." In these cases the turf, herbage, trees, and road (if opened) would apparently be annexed to the land, or as Coke expresses it in reference to trees, in property they are divided from the land although in fact annexed. (4 Coke, 63.) The same is true *a fortiori* of a constructive fixture. (*Ropp v. Barker*, 4 Pick. 243.)

But the plaintiff in his declaration avers that the rails were *attached* to the *freehold* and premises described in the indenture, and were *part* and *parcel* thereof." This was a question of fact, the affirmative of which the plaintiff was bound to establish. Until this was done, the fence was not within the grant, and of course the deed could not be relied upon as an estoppel. It was in

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fact a question of parcel or no parcel, upon which both parties were at liberty from the necessity of the case to give evidence, in order to identify the subject of the conveyance.

And finally, no precedent from the earliest period can be found of an action of this character. The books are full of controversies between vendor and vendee as to the effect of a grant upon property claimed as fixtures. But this is the first attempt to extend the covenant of seizin to *personal* property, upon the ground that the vendee probably *supposed* that it was part of the freehold. There are substantial reasons for this silence. The covenant of ownership and of seizin are broken, if at all, upon the delivery of the deed. If at that time the supposed fixture is really such, it *passes* by the grant; if it is not a fixture, it remains a mere chattel, and cannot be the subject of covenants which are restricted to the land only. In neither case, consequently, can there be a breach of the covenants. Hence the declaration in this cause is a *felo de se*, and must be so in every case of a similar character. For example, the plaintiff avers, 1st. That the rails were attached to the freehold, and are parcel of the premises. This averment was necessary in order to bring the subject within the grant. And 2d. by way of breach, "that they were not at the time of the conveyance the *property* of the defendant." The two propositions are utterly repugnant. For if the rails were owned by a person having no interest in the land, they were for that reason personal property, and therefore could not be a part of the freehold. If on the contrary they were parcel of the land, they could not be the property of a person having no interest therein, and of course would pass by the grant. In *Rogers v. Woodbury*, (15 *Mass.* 158,) the action was trover for a fish house; and it was held by the court, "if the owner of the land did not own the building, and if the owner of the building had no interest in the land, the building was personal property." In the case before us, the owner of the land did not own the fence, and the owner of the fence had no interest in the land. (*Smith v. Benson*, 1 *Hill*, 176; 4 *Coke*, 63; 3 *McCord*, 553; 8 *Mass.* 411; 1 *Fairf. R.* 429.)

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I am of opinion that the charge of the judge was erroneous and that there should be a new trial.

JEWETT, C. J. and JONES, J. also dissented, and concurred in the opinion of GARDINER, J.

Judgment affirmed.

1	581
112	522
112	623
112	524

1	581
167	100

THE TRUSTEES OF HAMILTON COLLEGE, *appellants*, vs. ALVAN STEWART, *respondent*.

The endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designed for that object.

And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no request can be implied therefrom against the subscribers that the institution shall perform the services and incur the expenses necessary to fill up the subscription.

Accordingly, where the defendant subscribed \$800 to a fund for the payment of the salaries of the officers of Hamilton College, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and contributions should be \$50,000; *held*, that there was no consideration for the undertaking and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition.

THIS case was before the late court of errors, and is reported in 2 *Denio*, 403. After the decision of that court as there reported, the plaintiffs again brought the cause to trial at the Oneida circuit, before GRIDLEY, Cir. Judge, in September, 1846, and by consent the facts were read to the jury from the error book upon which the cause had been argued in the court of errors. There was some additional testimony not material to the question on which the case was decided in this court. The circuit judge nonsuited the plaintiffs, and his decision was affirmed by the supreme court. The plaintiffs brought error to this court.

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C. P. Kirkland, for the plaintiffs in error.

Luther R. Marsh, for the defendant in error.

GARDINER, J., delivered the opinion of the court. The conclusive objection to the maintenance of this action is the want of consideration for the undertaking of the defendant. This is not a case of mutual promises where the undertaking of one party is the consideration for the promise of the other. (*Livingston v. Rogers*, 1 *Caines' Rep.* 534; *Chit. Pl.* 296.) This was so adjudged by the supreme court when the case was before them upon demurrer to the declaration. As I read the agreement, there is no engagement whatever upon the part of the plaintiffs, or any other person, to do or forbear to do any thing as a consideration for the promise of the defendant. The clauses in the instrument to which we are referred by the counsel for the plaintiffs, are mere conditions limiting the liability of the defendant, or designating the purpose to which his money, when paid, is to be applied. The subscribers say that they will not pay any thing unless the sum of \$50,000, including their subscription, shall be invested, and the interest shall be applied to the payment of the salaries of the officers. But the corporation do not undertake that that sum shall be subscribed, or that any other person will endeavor to procure subscriptions, or that they will make the investment or appropriate the income of the fund to the purpose designated. The corporation have not executed the agreement, and there is no evidence that they knew of its existence until after the subscription of the defendant. The first count of the declaration, which is founded upon mutual promises, is not therefore sustained by the agreement.

The second count, upon which the chief reliance is placed, seems to have been framed with a view to the suggestions of C. J. Nelson contained in his opinion attached to the case. This count proceeds upon the supposition that the agreement furnished evidence of a request to the plaintiffs by the defendant to perform certain services, in consideration of which he prom-

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ised to pay them the sum of \$800. If this is the true construction of the writing, the right of the plaintiffs to the subscription money is unquestionable. The cases referred to by the chief justice, and others cited upon the argument, are quite conclusive to show that the value of the services, or the amount of the consideration, is of no importance where a stipulated sum is agreed to be paid for the performance of a specific service. (*Sturlyn v. Albany*, *Cro. Eliz.* 67; *Id.* 469; 1 *Sel.* 32; *Saund. Pl. & Ev.* 147.) In looking at the contract, however, we meet with the same difficulty, in another form, to which I have alluded in reference to the first count of the declaration. There is no *request* by the subscribers that the plaintiffs shall do any thing. They agree to pay the trustees of Hamilton College the sums by them severally subscribed, and then add, "that we shall not be holden to pay the sum subscribed by us, unless the aggregate of our subscriptions and of contributions to this object shall, by the 1st of July, 1834, amount to \$50,000," &c. The trustees are made, by the subscription, the mere depositories of the money, and nothing more. If any other person had been designated, the agreement would have been as effectual for all the purposes contemplated, as in its present form. There certainly is no express request to the plaintiffs, or the trustees as their representatives, to procure subscriptions or contributions. Nor can a request be implied from the agreement. The endowment of the college was, in legal contemplation, no benefit to the subscribers. The public advantage arising from the diffusion of knowledge and the advancement of science, however important in themselves, have not been held a sufficient consideration alone to uphold an agreement of this character. (2 *Pick.* 580.) We cannot therefore imply a request from the beneficial nature of the services to the subscribers. Nor is it to be inferred from the object to be obtained by the subscription. The purpose, as stated by the plaintiffs in their declaration, "was to endow the institution, by providing a fund for the payment of its officers." In effect, it was to add \$50,000 to the permanent funds of the college, without abstracting any thing from those already accumulated. How then are we authorized to imply a request by the subscri

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bers, that the plaintiffs should, as they allege, "at great labor and expense," procure these subscriptions? Every dollar thus expended required an equivalent sum to be raised, in order to put the institution upon the footing contemplated by the subscribers.

In truth, when carefully examined, the agreement of the defendant amounts to a promise to give \$800 on certain conditions. When these conditions are fulfilled, no matter by whom, or at whose procurement, the donor, according to the letter of his promise, is to pay. It cannot be doubted that if an individual or an association had, subsequent to the subscription of the defendant and prior to July, 1834, without the request or knowledge of the plaintiffs, invested \$50,000 for the purpose mentioned in this contract, and obtained the certificate of Mr. Hunt, the letter and spirit of the conditions precedent upon which the gift depended would have been complied with. If the plaintiffs subsequently accepted the money or securities, they of course would take them subject to the trust annexed by the donors to the gift. If they declined, the money would revert, and the depositary, whoever he might be, would hold it in trust for the use of the subscribers.

These remarks, if well founded, dispose of the case. The principles involved in the case are, however, of general interest, and I will therefore advert to some of the principal authorities that have been pressed upon our consideration. In *McCauley v. Billinger*, (20 John. R. 89,) a committee was appointed at a church meeting to receive subscriptions, and to contract for the repairs of the church in the manner set forth in the subscription. The subscription is not given, but the court held "that the consideration for the defendant's promise, was the repairing of the church. That the defendant by signing the paper, sanctioned the acts of the meeting." According to the view of the court, it was in effect a written request to the committee to make repairs, in consideration of which the defendant undertook to pay. This is the strongest case for the plaintiffs in our reports. In the case of the *Amherst Academy v. Cowles*, (6 Pick. R. 427 to 438,) the action was upon a note payable to the plaintiffs, given for a subscription to a fund for the use of a

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college which, at the time of the subscription, had not been incorporated. The plaintiffs were to have the property of the fund, and the *management* thereof according to the provisions of the constitution subscribed by the defendant, and when the institution was incorporated, it was provided that the plaintiff *should* transfer to the college the whole fund and the evidences thereof. These duties were performed, and subsequently the defendant gave his note, and thereby acknowledged that he had received value, and that it was given in pursuance of his previous covenants. It was a manifest instance of services performed at the request and by the direction of the defendant, for which an action might have been sustained upon the subscription itself, independent of the note. It resembles in this particular the case of *R. Society of Whitestown v. Stone*, (7 John. R. 113,) which was referred to by the court in their decision. *Limerick Academy v. Davis*, (11 Muss. R. 114,) was an action upon a subscription very similar to the one before us. Judgment was given for the defendant. The court held "that it was a promise to give, connected with a similar promise of others to give for the same purpose; at most it was a donation to come into operation at the will of each subscriber." In *Bridgewater Academy v. Gilbert*, (2 Pick. 579,) the subscription upon which the action was brought was as follows: "We the subscribers, being desirous that the academy edifice should be rebuilt immediately, do hereby promise to pay to the committee which may be chosen by the trustees of the B. Academy, the sum set opposite our names for the above purpose." The edifice was rebuilt. And the court held, "that the subscription paper would not sustain the action. That providing materials upon the faith of the subscription, was not sufficient to show that the expenses were incurred at the implied request of the defendant." If a request could not be inferred from that paper, it is impossible to say that it can be implied from the one under consideration. Indeed, all the authorities, it is believed, will be found consistent with the result to which we have been led by the terms of the agreement.

If, with C. J. Nelson, we find that the defendant agreed to
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pay \$300 provided the plaintiffs *would* procure subscriptions, and *should* afterwards invest the money, &c.; this, according to the cases, would amount to a request to perform those services, and the defendant would be liable. With all our anxiety to sustain this contract, we do not think it susceptible of that construction. And our conclusion upon this point renders it unnecessary to examine the other objections to the action suggested upon the argument.

Judgment affirmed.

JANET WILKES and others, *appellants*, vs. JAMES HARPER,
and others, *respondents*.

Co-legatees in no sense sustain to each other the relation of surety in respect to the testator's debts, each being liable only in proportion to the amount of his legacy.

One who pays a debt for which he is not personally bound, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor.

Legatees, whose shares of the personal estate of the testator have been wasted by the executor, have no lien upon the real estate devised to such executor to make good their loss.

An executor, who was also a devisee and legatee, died insolvent, having wasted a large portion of the estate, and leaving unpaid a debt against the testator, and also a judgment against himself for a debt in no way connected with the estate, which judgment was a lien on his share as devisee in certain real estate of the testator. His co-devisees and legatees were his heirs at law, and as such took his share in the real estate; and having paid the whole debt against their testator, they filed their bill against the judgment creditor of the deceased executor, claiming to be substituted to the lien of the creditor whom they had paid, upon the executor's share in such real estate, and to restrain the sale thereof by the judgment creditor; also claiming a lien thereon in consequence of the *devastavit* of which the executor had been guilty. *Held*, that the bill could not be sustained.

APPEAL from chancery. The appellants filed their bill in the court of chancery against the respondent, stating in substance as follows:

Charles Wilkes died in 1833, possessed of personal estate of

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the value of about \$280,000, and also of a very large real estate, a part of which consisted of the house and lot No. 28 Laight-street in the city of New-York. He left his widow, Jane Wilkes, and six children, George, Hamilton, Horatio, Anne, Charlotte, the wife of Lord Jeffrey of Edinburgh, and Frances, the wife of D. C. Colden, surviving him, and appointed his widow executrix, and his three sons executors of his will. By that will he bequeathed to his widow his house and lot No. 28 Laight-street for life, giving her the right to elect between that and another house and lot in the same street, he also gave to her the use of his furniture, plate, pictures, and carriages and horses for life. In addition to this, he gave to his executrix and executors \$50,000 in trust to invest the same and pay over the interest thereof to his widow for life, with power to her to dispose of \$30,000 of the capital thereof at her death by will, and the other \$20,000 was then to sink into his residuary estate; and after giving \$6000 in legacies to his nephews and niece, he disposed of the residue of his real and personal estate among his six children in equal shares; the sons to take their shares absolutely and directly, and the share of one of the daughters was vested in his executrix and executors, to sell the same and pay the proceeds to her or her representatives. The shares of the other two daughters he devised and bequeathed to other persons as trustees in trust to sell and convert the same into money, and to invest the proceeds in permanent securities for the separate use of those two daughters respectively for life; with power to the daughters to dispose of the same by will, and in default of such disposition, then he gave the same to the heirs or assigns of such daughters forever.

The widow and all the sons proved the will of the testator, and took out letters testamentary thereon, but they permitted Horatio Wilkes, one of their number, to have the principal control and management of the funds of the estate. Out of the funds which came to his hands he paid for debts due from, and moneys held in trust by, the testator, about \$130,000, and he set apart and invested \$50,000 for the legacy to the widow, in addition to the furniture, &c., specifically bequeathed to her. He

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also paid the legacies to the nephews and niece of the testator. Portions of the real estate had also been sold, either by the devisees or by Horatio Wilkes, as their agent, to the amount of about \$95,000; the proceeds of which sales, with the exception of \$26,000, received by his brother Hamilton, came into his hands for convenience of distribution. He also received about \$30,000 for the interest and income of the personal estate which had come to his hands as one of the executors, and for rents and profits of real estate which the devisees had suffered him to collect and receive, and for interest on the proceeds of real estate in his hands for distribution. Out of these proceeds of the real and personal estate, in December, 1838, Horatio Wilkes distributed between himself and his brother George, and the trustees of his three sisters, about \$100,000, in equal proportions. Hamilton Wilkes retained in his hands the \$26,000, on account of his share of his father's real and personal estate; leaving in the hands of Horatio Wilkes between \$50,000 and \$60,000 of the proceeds of the personal estate, and of the real estate that had been sold as a fund to pay the residue of the debts of the testator, and for future distribution among those who were entitled to the same. This sum, with the exception of \$2,400, as the respondents alleged in their bill, Horatio Wilkes wasted or appropriated to his own use, previous to the recovery of the respondents' judgment against him, in January, 1837. He also wasted or appropriated to his own use about \$27,000 of the trust fund, which he had previously set apart and invested for the legacy to his mother. In January, 1837, the respondents in this suit recovered a judgment against Horatio Wilkes and two other persons, in the superior court of the city of New-York, for \$2,838, for a debt in no way connected with the estate of the testator; which judgment became a lien upon the legal title of Horatio Wilkes, in one-sixth of the remainder in fee of the house and lot, No. 28 Laight-street, devised to him by the will of his father. In March, 1840, Horatio Wilkes died unmarried and intestate, leaving his mother, his two brothers, and three sisters his only heirs at law. All his estate and property of every kind, with the exception of his interest in the Laight-

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street lot, had, previous to that, been applied to the payment of his debts, leaving the judgment of the respondents in this suit and the debts due from him on account of his father's estate unpaid. At the time of his death there also remained due from the estate of the testator, to Fanny Garnett and Harriet Garnett, a debt of about \$12,500 for moneys received in trust by the testator in his lifetime, and invested by him in his own name, which fund came to the hands of the acting executor, and was wasted by him previous to the recovery of the judgment of the respondents. In May, 1840, Hamilton Wilkes applied the \$2400 of the proceeds of the estate of his father which had not been wasted by the acting executor, to the payment of a part of the debt of the Misses Garnett. And being advised that the surviving executor and the executrix, and the residuary legatees and devisees were liable to pay the balance of that debt, he paid it out of his own funds, upon his and their account, and with their assent. The respondents afterwards sued out a scire facias against one of the surviving judgment debtors, and against the assignee of the other who had been discharged under the bankrupt act, and against the brothers and sisters, and the mother of Horatio Wilkes, as his heirs at law, to revive their judgment, and have execution thereon against the estate upon which it was a lien. The appellants, the widow and surviving children of Charles Wilkes, with the husbands and trustees of the daughters, thereupon filed their bill, stating these facts, and also stating that other claims were made against the estate of Charles Wilkes, the validity of which, however, they did not admit, and claiming the right to have the residuary real estate which was devised to Horatio by the will of his father, applied to pay the balance due to them, and the amount which Hamilton Wilkes had paid for them to the Misses Garnett, and any other debts of the testator which they might be compelled to pay. They also prayed for an injunction to restrain the respondents from proceeding upon the scire facias to revive their judgment, or from commencing any other suit or proceeding to enforce the lien of their judgment against the interest which Horatio Wilkes had under the will of his father in the house

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and lot No. 28 Laight-street. The injunction was issued accordingly, upon the certificate of one of the vice chancellors, acting as an injunction master. The chancellor, on the respondents' motion dissolved the injunction, on the ground that there was no equity in the bill. And the complainants appealed to this court.

IV. *M. Evarts*, for the appellants. I. The bill claims an equitable lien in favor of the complainant, Hamilton Wilkes, upon the estate of Charles Wilkes, devised to Horatio Wilkes and of which Horatio died seized, on account of a debt of the testator, paid *in solido* by said Hamilton, and to which said Horatio's share of the testator's estate is bound to contribute; and that such equitable lien is superior to the lien at law of the defendants' judgment. (1.) The lands devised were liable to contribute ratably to the payment of this debt of the testator. (2 *R. S.* 369 to 372, §§ 26, 28 to 32, 36 to 43, 52, 53, 60.) (2.) The payment of this debt *in solido* by one of the devisees, entitles him to be subrogated to all the rights, remedies and liens which the creditor had, before such payment, upon or against the testator's estate in the hands of the other devisees, for their contributory share towards the payment of the testator's debt. (1 *Stor. Eq.* § 499; *Cuyler v. Ensworth*, 6 *Paige*, 32; *Eddy v. Traver*, *id.* 521; *Schermerhorn v. Barhydt*, 9 *id.* 28, 42, 43, 47; *Buchan v. Sumner*, 2 *Barb. Ch. Rep.* 165.) (3.) The rights and liens of such creditor of the testator, and therefore of such subrogated devisee, are paramount and superior to any lien which any individual creditor of any other devisee can obtain upon the devised estate in the possession of his debtor. (*In re Howe*, 1 *Paige*, 128; *Morris v. Mowatt*, 2 *id.* 586; *Kiersted v. Avery*, 4 *id.* 9; 2 *Stor. Eq.* § 1228; *Finch v. Earl of Winchelsea*, 1 *P. Wms.* 278; 4 *Kent's Com.* 154.) (4.) At the time of the payment by Hamilton Wilkes, the share of Horatio in the house in Laight-street had descended to his brothers and sisters, and they were liable in respect to that share, to make good to the creditors of Charles Wilkes, the contributory share of Horatio as the devisee of

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Charles Wilkes, to the payment of such testator's debt. The payment by Hamilton was a payment by them all, and as it included Horatio's contributory share, they have an equitable lien upon his share of the testator's property for their indemnity.

(5.) The payment by Hamilton Wilkes thus made after the death of Horatio, and with the knowledge and assent of his heirs and administrator, as including Horatio's contributory share, (if necessary to sustain the equity claims against Horatio's share of his father's estate,) entitles Hamilton Wilkes to be considered the equitable assignee of the Misses Garnett's claim.

(6.) The complainant, Hamilton Wilkes, therefore, has an equitable lien to the amount of \$2200, or thereabouts, with interest, upon Horatio's estate in remainder in one-sixth of the house in Laight-street, superior to the lien at law of the defendant's judgment.

II. The bill sets forth that Horatio Wilkes was the sole acting executor (though others qualified) of the estate of Charles Wilkes; that there were abundant assets of said estate in his hands to pay all the debts of the same; that Horatio was guilty of a devastavit before the recovery of the defendant's judgment; and upon an accounting made up between him and his father's estate, as of Jan. 1, 1840, he was found to be indebted to his father's estate in the sum of \$59,112.26, upon such devastavit so committed prior to the recovery of the defendant's judgment.

(1.) The co-devisees of Horatio, as against him are entitled to have the real estate which was devised to him by his father subjected to the payment of the debts of the estate of Charles Wilkes, before they shall be called upon to contribute, and they would have an equitable lien to that effect upon Horatio's share of his father's estate in his hands, or in the hands of his heirs or devisees. (2.) A judgment creditor's lien upon the property of his debtor is always subject to every superior equitable lien upon the same, whether latent or otherwise.

III. The co-devisees of Horatio have also an equitable lien upon their testator's estate in the hands of Horatio to make good the whole sum of \$59,112.26 and interest from January 1, 1840, lost to them by reason of the devastavit of Horatio, and

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if there were no debts of the estate of the testator to be provided for, the co-devisees of Horatio would have a better lien upon his estate derived from their testator, than any individual creditor of Horatio could have. (1.) Horatio will be deemed to have taken his full share of the testator's estate in the sum which he wasted, and any devised property found in his possession after the devastavit will be treated as a residuum of the testator's estate for distribution among the other devisees. (2.) The equitable claims of the creditors and co-devisees of Horatio were fixed anterior to the recovery of the defendant's judgment, and are therefore prior in time, as well as superior in equity.

S. A. Foot, for the respondents. I. The personal assets of Charles Wilkes, the testator, being not only sufficient, but vastly more than sufficient to pay all his debts; and notwithstanding the large amount wasted by Horatio Wilkes, his son and acting executor, there yet remaining unwasted and actually applied to the payment of the testator's debts and distributed among his legatees, specific and residuary, sufficient to pay all his debts—and no creditor of the testator, after due proceedings before the proper surrogate's court, or at law, having been unable to collect his debt, or any part thereof, from the personal representatives of the testator, or from his next of kin or legatees—neither the appellants, nor any creditor of the testator, nor any person standing in the place of and having the rights of such creditor, has any claim, legal or equitable, on the real estate devised by the testator to his son, Horatio Wilkes. (2 *R. S.* 3d ed. 547, § 33; *id.* 550, § 60. See also *id.* 548, § 86 *Gere v. Clark*, 6 *Hill*, 350; *Bulls v. Geniung*, 5 *Paige*, 254; *Schermerhorn v. Barhydt*, *id.* 28.)

II. The debt or demand which the appellants had against Horatio Wilkes in his lifetime, and have since his death against his representatives, by reason of his wasting a large amount of the testator's estate, however legal and just, constitutes no equitable lien on his real estate, whether acquired by devise from the testator or otherwise, especially to the prejudice of the lien of the respondents by virtue of their judgment.

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GARDINER, J. The complainants are the legatees and devisees of Charles Wilkes, the testator, and some of them the heirs at law of Horatio Wilkes, his executor, who died intestate. As legatees of Charles Wilkes they in no sense sustained to their co-legatee Horatio, or to each other, the relation of surety in respect to the debt of the Misses Garnett, or any other demand against the estate of their testator. According to the revised statutes, 452, section 28, "The whole amount which a creditor of the testator shall be entitled to recover, shall be apportioned among the legatees in proportion to the respective amounts of their several legacies, and such proportion only shall be recovered of each legatee." The judgment prescribed by the 30th section is to the same effect. Their liability as devisees in respect to the real estate was in like manner several, and limited by the estate, interest, or right devised to them by the testator. (2 R. S. § 32.) The complainants were therefore separately liable for their respective proportions, and the payment of Horatio's share by the other legatees, if at his request, would have been money advanced for *his* use; and if voluntarily made without his assent, it would impose no obligation, either legal or equitable, upon him or his representatives.

The same remark is applicable to that portion of the estate of Charles Wilkes which came to the hands of Horatio as executor, either with or without the assent of the complainants, and which was wasted by him. In either case, Horatio would have become the debtor of his co-legatees or devisees respectively for their distributive shares of the testator's property. But this would give them no lien either at law or in equity upon the real estate devised to Horatio. We agree fully with the chancellor, that there was nothing in the nature of an equitable hypothecation by Horatio of his interest as devisee in the real estate of his father as a security for the faithful performance of his trust as executor.

It is urged by the counsel for the appellants, that at the time of the payment by Hamilton Wilkes of the Garnett debt, as stated in the bill, the share of Horatio in the house in Laight-street had descended to his brothers and sisters, and they were

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liable in respect to that share to make good to the creditors of Charles Wilkes the contributory share of Horatio as devisee of Charles Wilkes to the payment of his debt; that the payment by Hamilton was a payment by them all; and as it included Horatio's contributory share, they had an equitable lien upon his share of the testator's property for their indemnity. The complainants, it must be remembered, are the widow and surviving children of Charles Wilkes, and the husbands and trustees of the daughters. The bill states that the Garnetts demanded payment of their debt from *the estate of Charles Wilkes*. It alleges that they were advised that they were liable in respect of any *estate or moneys* received from *Charles Wilkes*; not in respect of the estate which descended to a part of them from one of his devisees. And being so advised, Hamilton Wilkes *thereupon* paid the debt with his own money, under an agreement with *all* the complainants that it should be considered a payment in behalf of the estate of *Charles Wilkes*. They then insist that Hamilton Wilkes ought to be subrogated to the right of the Garnetts to the extent of \$2,200, the contributory share of Horatio, and that the former has a lien for that amount paramount to the personal creditors of the latter. The payment was therefore on account of the presumed liability of the complainants as legatees and devisees of Charles Wilkes; and their promise of repayment was in the same character. Hence the claim that Hamilton should be substituted in place of the Garnetts, and paid the contributory share of Horatio, is in behalf of *all* the complainants as legatees and devisees of Charles, and not in behalf of the heirs of Horatio Wilkes. The whole frame of the bill is therefore inconsistent with the idea now suggested for the first time, that the money was advanced to the Garnetts by Hamilton, at the request of his co-heirs in respect to his and their liability as the heirs of their brother.

And, in the second place, the complainants who were heirs at law of Horatio Wilkes, were in that character liable for all his debts to the extent of the real estate inherited by them. (2 R. S. 452, § 32.) In order to retain the property they were

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bound to pay both the contributory share of Horatio for the Garnett debt, and the judgment of the defendants.

The bill is silent as to the value of Horatio's interest in the Laight-street property. For aught we can say, it may have been sufficient to discharge both demands. The most that the heirs of Horatio can claim is, that they have paid a debt of their ancestor which was preferred to that of the appellees by the equity of the statute. (2 R. S. 455, § 48.)

But if the residue of the real estate, after deducting the contributory share of Horatio to the Garnett debt, was sufficient to pay the judgment of the appellees or any part of it, they ought not to have been restrained by injunction from obtaining satisfaction pro tanto.

The decree of the chancellor must be affirmed.

Decree affirmed.

MATHEWS and others, *appellants*, vs. AIKIN, *respondent*.

The right of a surety to be subrogated, on payment of the debt, to the securities held by the creditor, does not depend upon contract, but rests upon principles of justice and equity.

A. owed a debt to B., who was indebted to C. At the request of B., and in pursuance of an arrangement between B. and C., A. executed a bond and mortgage for the amount of his debt, directly to C. The complainant D., on the solicitation of B., but without any request from the mortgagor, guarantied the payment of the bond. The holder of the bond and mortgage, who had also become the owner of the equity of redemption under a junior mortgage, sued D. upon his guaranty and compelled him to pay the debt. *Held*, on bill filed by D., that he was entitled by substitution to the benefit of the mortgage for his indemnity.

Where real estate is encumbered by two mortgages, and the holder of the junior one forecloses and purchases in the property, the presumption is that he bids to the value of the equity of redemption only; and the land becomes from thenceforth the primary fund for the payment of the debt secured by the senior mortgage.

APPEAL from the supreme court in equity. Abraham Aikin filed his bill in the court of chancery before the vice chancellor

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of the seventh circuit, against John Mathews and Oliver Orcutt, who appeared and defended, and against Edward Aikin, who suffered the bill to be taken as confessed. The case, so far as material to be stated, upon pleadings and proofs was as follows: On or before the 22d of November, 1837, Edward Aikin, who was the son of the complainant, executed to James Hasbrook a bond secured by mortgage on certain real estate, bearing date December 6, 1836, conditioned for the payment of \$1300 in six equal annual instalments. At the time of the execution of the bond and mortgage, Edward Aikin was indebted to one Theodore Wood in the amount thereof, and Wood being also indebted to Hasbrook, procured the bond and mortgage to be executed directly to him. At the time or soon after the bond and mortgage were given, the complainant, at the solicitation of said Wood and Hasbrook, executed upon the bond a sealed guaranty of the payment thereof. There was no evidence that the complainant executed the guaranty at the desire or request of Edward Aikin, the mortgagor. Edward Aikin was examined as a witness for the complainant, and on cross-examination testified that *he advised his father not to sign the guaranty*, informing him that he was under no obligation to procure a guaranty.

On the 27th of August, 1841, the said Edward Aikin executed to the defendant John Mathews a mortgage upon the same premises, conditioned to pay the sum of \$663.36. The mortgage to Hasbrook had been previously recorded, and Mathews had also actual notice of the existence thereof. On the 11th of February, 1843, Mathews having caused his mortgage to be foreclosed in chancery, purchased the premises at master's sale under the decree for the sum of \$500, and procured the master's deed to himself. After such purchase, and on the 26th of April, 1843, the personal representatives of James Hasbrook (who had died) assigned the bond and mortgage first above mentioned to the defendant Oliver Orcutt. The consideration for this assignment was paid by Mathews, and such assignment was made in trust for him and for his benefit only. Immediately afterwards, Mathews caused an action at law to be

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commenced, in the name of Hasbrook's representatives, against the complainant upon the aforesaid guaranty, and recovered judgment against him for the sum of \$370.76, the amount of the last instalment due upon the bond and mortgage, the other instalments having been previously paid. The complainant thereupon tendered the amount recovered against him, and demanded that Orcutt assign the bond and mortgage to him. This was refused; and the complainant then paid absolutely the sum, and demanded an assignment. This was also refused. At the commencement of this suit, the defendant Mathews was in possession of the premises under his purchase at the master's sale above mentioned. Edward Aikin was insolvent. The complainant claimed by the bill to be subrogated to the rights of Orcutt or Mathews as the holder of the bond and mortgage for the purpose of reimbursing to himself the sum collected of him by suit on the guaranty; and the prayer of the bill was that such right of subrogation might be declared, and that the premises might be sold, &c. •

The vice chancellor decreed in favor of the complainant according to the prayer of the bill. The defendants appealed to the chancellor, and the cause then became vested in the supreme court organized under the new constitution; and that court, sitting in the fifth district, affirmed the decree of the vice chancellor. The defendants appealed to this court.

B. D. Noxon, for the appellants. When a third person volunteers to guarantee the payment of a bond and mortgage after its execution and delivery, with or without a consideration passing to him from the holder, and especially when he so guarantees against the express desire and advice of the mortgagor and obligor, he cannot, by paying the amount secured by the bond and mortgage, make the mortgagor his debtor, and recover against him for money paid; nor does he, by such officious guarantee, acquire the character of a surety, so that, after payment by him of the demand, he can ask to be subrogated or substituted to all the rights and remedies of the mortgagee or holder of the mortgage. Such payment extinguishes the debt

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and the security; and the guarantor has no claim either at law or equity to be repaid. (*Com. on Cont.* 452; *id. ed.* of 1809, 151; *Child v. Morley*, 8 T. R. 613; *Exall v. Partridge*, *id.* 310; 3 John. 431; 10 *id.* 361; 14 *id.* 88; *Ster. Eq.* § 499 *b*, and note 3 to p. 477; *Copis v. Middleton*, 1 Tur. & Russ. 228; *Hodgson v. Shaw*, 3 Mylne & Keene, 190, 1, 2; *Sandford v. McLean*, 3 Paige, 122; *Fink v. Mashfy*, 3 Watts, 384; 4 Barb. Eq. Dig. 672, §13.)

Geo. F. Comstock, for the respondent. The complainant as a mere surety is entitled to be substituted to all the rights of the holder of the bond and mortgage, for the purpose of enforcing the mortgage lien for the sum collected of him, in the same manner that the holder of the bond and mortgage might have done. (1 *Story's Eq.* §§ 327, 499, 501, 502; 1 *John. Ch.* 409; 4 *id.* 545; 2 *id.* 554; 6 *Paige*, 521; 10 *id.* 445.)

This right of substitution is not affected by the consideration urged on the other side, that Abraham Aikin did not execute the guaranty at the request of Edward Aikin. The right of substitution does not depend upon any express or implied contract between the principal and surety; but it rests upon principles of equity wholly independent of contract. It results from the relation which the surety and the creditor hold to each other, and from the equitable obligation of the principal to pay the debt. (*Deering v. The Earl of Winchelsea*, 2 B. & P. 270; *Norton v. Coons*, 3 Denio, 180; *Story's Eq.* § 493; § 499 and note; *Hodgson v. Shaw*, 3 Mylne & Keene, 190, 1, 2, *per Id. Brougham*; *Sir Samuel Romilly arguendo*, 14 Ves. 159; 2 *John. Ch. Rep.* 561, 562; 4 *id.* 180, 181, 182.) The following instances may also be put as illustrations of the doctrine that the right of substitution does not depend upon contract. (1.) A junior mortgagee who pays off a senior mortgage is entitled to be substituted. (4 *John. Ch.* 370; 2 *Cowen*, 118; 9 *id.* 409; 3 *Wend.* 412; 5 *Hill*, 280.) (2.) Where two parcels of real estate owned by different persons are covered by one mortgage, and one of the owners ought to pay it; if the other is obliged to pay it, he is entitled to be substituted to the lien.

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(8.) A mortgagor who sells subject to the mortgage, and is obliged to pay by suit on the bond, is entitled to this right. (10 *Paige*, 595.) (4.) In the case of a vendor's lien, if the vendor resorts to the personal assets of a decedent, the creditors and legatees are entitled to take his place. (2 *Story's Eq.* 1227.) (5.) When one creditor has a lien on two funds, and another only on one; if the first creditor resorts to the fund on which the other has a lien, the latter takes his right in the other fund by substitution. (1 *Story's Eq.* 638, 637.)

It does not at all alter the case that the defendant Mathews has acquired title to the premises under a junior mortgage given to himself. Such a title is subject to the senior mortgage and to the right of the surety, who has paid the mortgage, to be subrogated. Mathews had also both actual and constructive notice of the senior mortgage, when he took his mortgage and when he purchased at the sale under it. Further; when Mathews purchased the equity of redemption under the junior mortgage, the premises became the *primary* fund for the payment of the debt, even as against Edward Aikin, the mortgagor, and when the bond and mortgage were afterwards purchased in by Mathews, and the assignment taken to Orcutt in trust for him, the debt became in equity *extinguished*. (7 *Paige*, 248; 2 *John. Ch.* 125; 10 *Paige*, 503, 249.)

JOHNSON, J. It is a general and well established principle of equity, that a surety, or a party who stands in the situation of a surety, is entitled to be subrogated to all the rights and remedies of the creditor whose debt he is compelled to pay, as to any fund, lien, or equity which the creditor had against any other person or property on account of such debt. The general doctrine, as a rule of equity, is not controverted on the part of the appellants, but is fully conceded. It is insisted, however, by their counsel, that the guarantor in this instance did not become such at the request of the debtor; that as to the debtor, he was a mere volunteer, having no remedy over against him, and never acquiring the character of a surety so as to be entitled to subrogation to the rights and remedies of the creditor.

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The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration. But it leads us to examine carefully into the grounds and principles upon which the right of subrogation rests. Does it rest upon the foundation of a contract binding in a court of law between the debtor and his surety? In other words; does it turn substantially upon the question whether or not the surety who has paid the debt to the creditor has a remedy over, on his contract, against the principal debtor for money paid in an action at law? or does it not rest rather upon the broader and deeper foundations of natural justice and moral obligation? Chancellor Kent says, in *Hays v. Ward*, (4 John. Ch. 180,) "This doctrine does not belong merely to the civil law system. It is equally a well settled principle in the English law that a surety will be entitled to every remedy which the principal debtor has, to enforce every security, and to stand in the place of the creditor, and have those securities transferred to him, and to avail himself of those securities against the debtor. This right stands not upon contract, but upon the same principle of natural justice upon which one surety is entitled to contribution against another." Lord Brougham, in *Hodgson v. Shaw*, (3 Mylne & Keene, 183,) said: "The rule here is undoubted, and is founded on the plainest principles of natural reason and justice, that the surety paying off a debt shall stand in the place of the creditor, and have all the rights which he has for the purpose of obtaining his reimbursement. It is scarcely possible to put this right of substitution too high; and the right results more from equity than from contract or *quasi* contract unless in so far as the known equity may be supposed to be imported into any transaction, and so to raise a contract by implication." Sir Samuel Romilly, in his argument in *Craythorne v. Swinborne*, (14 Ves. 159,) stated the rule to be, that "a surety will be entitled to every remedy which the creditor has against the principal debtor to enforce every security by all means of payment, to stand in the place of the creditor not only through the medium of contract but

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even by means of securities entered into without the knowledge of the surety, having a right to have those securities transferred to him, though there was no stipulation for that, and to avail himself of all those securities against the debtor." And this exposition of the rule was fully sanctioned by Lord Eldon in giving judgment in that case.

The equity is certainly as strong, and it seems to me somewhat stronger in favor of substitution, as against the creditor at least, than it is between sureties for contribution where one has paid the whole debt, and it has been likened to the case of contribution between sureties. As between them the rule in equity is clear that the ground of relief does not stand upon any notion of mutual contract express or implied, but arises from principles of equity independent of contract. *Story's Eq.* § 493, and notes, where the authorities are all collected. This is also substantially the rule in courts of law. (*Norton v. Coons*, 3 *Denio*, 130.) In that case the circumstances under which the defendant became co-surety were such as to repel the presumption of any promise to make contribution. But the court held that his being a surety on the same contract without qualification in terms was sufficient to fix his obligation to contribute, and that for the purposes of giving the plaintiffs a remedy the court would presume a promise. A promise was therefore imputed where none confessedly existed, in order to provide a remedy for the party where there was no doubt as to the legal liability; and the legal liability in such cases springs from the equitable obligation; the law courts having borrowed their jurisdiction in these particular cases from the courts of equity. In the present case it seems to me, if it were necessary, a court of equity ought to imply a promise on the part of the creditor to subrogate the surety to all his rights and remedies, in case he resorted to the latter for payment of the debt upon his guarantee. The equitable obligation resting upon him to do so seems to me most manifest.

It is true, the case shows that the principal debtor informed the guarantor that he was under no promise or obligation to give security, which seems to have been insisted upon by the

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creditor, and that he advised his father not to give the guaranty. There is nothing, however, in the case to show that the debtor did not subsequently assent to it, even at the time the guaranty was executed, or that the money was not paid at his express request afterwards. But the case does show that the guaranty was executed at the repeated and urgent solicitations of Wood, the original creditor, and of Hasbrook, to whom Wood proposed to transfer the debt, and to whom, by arrangement between them, the bond and mortgage were executed. As to the creditor Mathews, therefore, who now stands in the place of Hasbrook, Abraham Aikin was not a voluntary surety for the debt of his son, but became so at his express request, or that of the mortgagee under whom he claims, and it seems to me, after Mathews has pursued Abraham Aikin to judgment and fixed his liability as surety for his son in a court of law, it does not lie with him to turn round and say he is a mere volunteer in assuming the obligation and paying the money, and therefore not entitled to the rights and privileges of a surety. The creditor should not be permitted in a court of equity to question the rights of the surety after the obligation has been incurred at his request, and he has fixed the character upon him by suit and judgment in a court of law. As to him at least, Aikin, the father, was surety for the debt of the son, and was compelled to pay that debt, or a portion of it; and it is immaterial as to the creditor what the state of the case is, or the legal rights are, as between the principal debtor and the surety. There is no reason why the creditor should set up a defence for the debtor. It is sufficient for him that he has received his debt of the surety to create the obligation on his part to surrender to the surety the securities in his hands. He is not to litigate the rights of the debtor, and set up defences for the latter which he, peradventure, might be too honest and conscientious to set up against the securities in the hands of a surety who had paid his debt for him.

It might be different if the debtor himself was here urging this defence, and especially if he was able to show that the surety entered into the obligation, not only against his wish or

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request, but for some purpose of fraud or oppression, or to make him his debtor against his will, or, as suggested by the appellant's counsel, to compel him to pay a debt to which, as between him and the creditor, he had a good defence at law. In such cases a court of equity would not lend the surety its aid, as he would not come before it with clean hands. But this is no such case. The principal debtor is here made a party, and suffers the bill to be taken as confessed against him. He sets up no such defence, nor does he pretend that he is not liable, or that he is not under both a legal and a moral obligation to his surety to repay the money which the latter has advanced for him. Indeed, he expressly swears that his father was a mere security for him for the payment of the bond, without receiving any consideration for becoming such surety. It is true he also testifies that he advised his father not to sign the guaranty, but it is obvious to my mind that this was in reference to a claim made by the creditor upon the debtor, that he was under some obligation to give some additional security. This appears to me quite evident from the appellant's answer and the course of the examination. It is sufficient, however, as I apprehend, that the debtor sets up no defence of the kind, and, although a party, admits the validity of the respondent's claim and would not afterwards be heard to allege it was illegal or invalid. Could the appellant Mathews be permitted to set up a defence so ungracious as against a surety whom he has compelled to pay his debt, he would be bound in order to make it complete to show, as I think, that the principal debtor resisted the surety's claim, and that the securities in the hands of the latter would be worthless, inasmuch as he could never enforce them against such principal. Otherwise the court would intend that the principal was willing to do what equity required him to perform.

But in addition to the general reasons against the creditor's resisting the claim of the surety to be subrogated, especially when the debtor makes no objection, there is I think in this case a particular reason why the appellant Mathews should not be heard to interpose such an objection. The case shows that he held a junior mortgage upon the same premises which he took

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with full knowledge of the existence of the present mortgage as an incumbrance upon the premises and subject to it; and that before he became the purchaser of the mortgage in question through Orcutt his trustee, he had foreclosed such junior mortgage and become himself the purchaser of the equity of redemption. At the time therefore that he became the assignee of the present mortgage he was the owner of the premises subject to this mortgage, and held them as a fund for the payment of this debt. (*McKinstry v. Curtis*, 10 *Paige*, 508; *Russel v. Allen*, *id.* 249; *Cox v. Wheeler*, 7 *id.* 248; *Tice v. Annin*, 2 *John. Ch.* 125.) It presents therefore the case of a creditor with the fund pledged for the payment of the debt in his hand, under circumstances which make it an equitable satisfaction of the debt, collecting the debt over again out of the surety, and then refusing to surrender the fund to him. The legal presumption is that Mathews, when he purchased the premises at the sale under his junior mortgage, only bid to the value of the equity of redemption, and he must be adjudged to hold them subsequently as a fund for the satisfaction of the prior incumbrance. And he might have been restrained in equity from proceeding to collect the debt afterwards from the mortgagor, or in case the latter had paid it, he would have been entitled to have the mortgage foreclosed upon the premises for his benefit—within the principle of the cases last above cited.

At the time Abraham Aikin was sued upon his guaranty he was ignorant that the assignment of the securities had been made to Orcutt as a mere trustee for Mathews, who was already the owner of the premises. And unless I greatly mistake the case, it exhibits strong marks of contrivance on the part of Mathews to discharge the premises from the incumbrance of the mortgage at the expense of Abraham Aikin. It seems to me quite clear, from the facts of this case, that the defence ought not to prevail.

But upon the general doctrine of subrogation, I agree fully with the learned judge who delivered the opinion of the supreme court, that the right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the prin-

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cipal debtor and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice. And if it were true that the surety in such a case as this could maintain no action at law against his principal for the money paid, I agree with the supreme court that it would furnish a still stronger case for subrogation. A court of equity would never presume that the principal would interpose such a defence. If the creditor has insisted upon the surety's discharging his obligations and liabilities as such, and fastened the character upon him by a judgment, he cannot, after receiving from him his debt, turn round and deny him the rights of a surety. The creditor must then fulfil his obligation to the surety, and leave the latter and his principal to adjust or litigate their rights or claims as they may see fit. There is no hardship in this. The surety might have filed his bill and compelled Mathews to collect the debt out of his principal through the mortgage before resorting to him. And in such a proceeding Mathews might with the same propriety have set up as a defence that the surety was a mere volunteer and could have no redress against his principal, and ought not to insist upon his proceeding against the principal in the first instance. The injustice of the defence might be a little more apparent in that case, but none the more real. Had Abraham Aikin owned the mortgage and assigned it to Mathews or to his trustee with his guaranty upon it at his request, no one, I apprehend, would pretend that Aikin, upon payment on his guarantee, would not be entitled to have the mortgage again from the creditor. How is his equity weakened by the consideration that to enable Wood the mortgagee to sell it to Hasbrook he, at the request of both Hasbrook and Wood, became the guarantor? It seems to me to be considerably strengthened by the fact that he derived no benefit from the transfer—especially as a doubt has been raised as to his remedy over at law for money paid against the mortgagor. If Hasbrook would have been bound to sur

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render to Wood, had he been the guarantor and made payment, I do not see why he is not, to the representative of Aikin, who became guarantor for the benefit and at the request of both Wood and Hasbrook.

Decree affirmed.

LANGLEY and LANGLEY vs. WARNER.

To render an appeal effectual for any purpose, an undertaking to pay *costs and damages*, pursuant to the 283d section of the code of procedure, must be executed. An undertaking under the 284th section to pay the sum recovered in the court below and all damages awarded on the appeal, although necessary in order to stay proceedings in the cases mentioned in that section, will not sustain the appeal.

The court cannot amend an undertaking without the consent of the sureties.

ON the 27th of September last Langley and Langley, as plaintiffs, recovered a judgment against Warner in the superior court of the city of New-York for \$185.19. On the 25th of October following, Warner gave notice of an appeal, and an undertaking was executed in pursuance of the 284th section of the code of procedure; but there was no such undertaking as is required by the 283d section: and on that ground,

J. Edwards, for the respondents, moved to dismiss the appeal.

A. Dean, for the appellant.

BRONSON, J. To render an appeal effectual for any purpose, there must be an undertaking that the appellant will pay all *costs and damages* which may be awarded against him on the appeal, *not exceeding* two hundred and fifty dollars. (*Code*, § 283.) When the judgment is for the payment of money, and a stay of execution is desired, the sureties must go further and undertake that the appellant will pay the amount of the judgment, so far as it shall be affirmed, and *all* damages which

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shall be awarded against the appellant on the appeal. (§ 284.) The undertaking in this case conforms to this section; and as there is an agreement to pay "*all damages*," the word "*damages*" in the preceding section is fully satisfied, and something more. But there is no agreement to pay *costs*, as the 283d section requires; and without that, the appeal was not effectual for any purpose.

The appellant asks leave to amend the undertaking. If it had been a bond, and the obligors had applied, we should have had power to allow an amendment. (2 R. S. 556, § 34.) But the instrument is not a bond, and the sureties have not applied. The court cannot amend a contract without the consent of the parties to it. The 149th section of the code of procedure authorizes the court to amend pleadings and proceedings in certain specified cases; but I think it clear that this case is not among the number. Whether upon common law principles we could not allow a new undertaking to be filed *nunc pro tunc*, I do not think it necessary to inquire; for in my judgment a court of review ought not to encourage appeals, and no special reason is shown for allowing an amendment in this case. If delay is not the object, and the appellant really desires to obtain the judgment of this court, he can bring a new appeal.

Appeal dismissed.(a)

(a) The motions in this and the three following cases were made and decided in January, 1849.

Rice v. Floyd.

RICE vs. FLOYD.

A final judgment was rendered in the supreme court in May, 1848, before the code took effect. After the code took effect, an appeal was brought according to its provisions. *Held*, that the judgment could be reviewed only by writ of error according to the old law. Appeal dismissed.

A. B. Ketcham, for the respondent, moved to dismiss the appeal. Floyd sued Rice before a justice of the peace, in August, 1847, and judgment was rendered for the defendant. On certiorari, the common pleas reversed the judgment. Rice then brought a writ of error, and the supreme court in *May last* affirmed the judgment of the C. P. Rice *appealed* to this court in *November last*, in the form and manner prescribed by the code.

N. Hill, Jr. for the appellant, opposed the motion.

BRONSON, J. The judgment of the supreme court was rendered before the code of procedure took effect; and we have already held, that the review should have been sought under the old law, and not under the new, which has nothing to do with the case. (*Mayor of N. Y. v. Schermerhorn*, ante, p. 426; *Spalding v. Kingsland*, id. 429.) But as it has been suggested that those cases do not necessarily decide the precise point made by this motion, and as it is possible that we may have fallen into an error in the first essay at expounding the new system, I have been induced to re-examine the question; and am confirmed in the first opinion.

The 271st section of the code abolishes the old mode of reviewing judgments and decrees, and substitutes the new machinery in its place. But the section relates only to actions commenced after the code took effect; (§ 8;) which was the first day of July last; (§ 391;) and this action was both commenced and ended before that time.

This brings us to the 2d section of the supplemental code, which took effect at the same time with the code; (§ 18;) and

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by which the provisions of the code, contained in the 271st and certain other sections, were applied to *future* proceedings in suits *pending* when the code took effect. This suit was not pending on the first of July—it had been terminated in the preceding May; and of course there has been no proceeding in the suit since the first day of July to be reviewed. Thus far it is entirely clear that the code says nothing about this case. The third subdivision of the 2d section, which speaks of the 271st and certain other sections in connection with the review of judgments and decrees “from which no writ of error or appeal shall have been already taken,” furnishes ground for an inference in favor of applying the specified sections to the review of judgments rendered before the first of July, as well as those which should be rendered after that day. But the third and all the other subdivisions of the section, are subordinate to, and qualified by, the general clause at the beginning; and if the language was as explicit one way in the subdivision, as it is the other way in the general clause, the latter would prevail; because it is the superior or most important part of the section. It is the trunk on which all the branches depend. And the case is still stronger when we reflect that the inferior clause of the section furnishes nothing more than an inference, while the superior or general clause has express and unequivocal words, limiting the application of the section to proceedings *after* the first of July in suits *pending* on that day. We think the question has been properly settled, and that the code has nothing to do with the case. If a review of the judgment is desired, it must be had by writ of error, and not by appeal. The 11th section of the code does not stand in the way, for it only affects determinations “hereafter made;” that is to say, made after the code took effect.

Appeal dismissed.

Tilley v. Phillips.

TILLEY vs. PHILLIPS.

o appeal will lie to this court from a decision of the supreme court granting or refusing a new trial on bill of exceptions, where such decision was made *after* the first day of July, 1849, when the code of procedure took effect; although the suit may have been commenced prior to that time.

PHILLIPS sued Tilley in the supreme court, and was nonsuited on the trial in November, 1846. The plaintiff took a bill of exceptions, upon the argument of which the supreme court granted a new trial in November last. From that decision the defendant, Tilley, appealed to this court, by giving notice of the appeal and executing an undertaking pursuant to the code of procedure. (§§ 275, 284.) The undertaking was not in the form of a bond.

H. P. Hunt, for the respondent, moved to dismiss the appeal.

H. Z. Hayner, for the appellant.

BRONSON, J. The judiciary act of December, 1847, gave an appeal from the decision of the supreme court in granting or refusing a new trial on a bill of exceptions. (*Stat.* 1847, p. 639, §§ 5 to 10.) If that provision was still in force, the defendant should have followed it, and given a bond on bringing the appeal: (§ 7.) But that is not the only difficulty. The decision appealed from was made after the code of procedure took effect, and after the right of appeal in such cases was at an end. The 11th section of the code (*see also* § 282) gives this court jurisdiction upon appeal in certain specified cases, "and no other;" and the order appealed from is not among the specified cases. The provisions of the judiciary act of 1847 giving the appeal are inconsistent with the 11th section of the code, and are consequently repealed. (*Code*, § 388.) This point was, in effect, decided at the last November term. (*Grover v. Ooon, ante*, p. 536. *See also Selden v. Vermilya, id.* 534.) The ap-

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peal must be dismissed ; but as it was brought since the code took effect, we cannot give costs of the motion to the moving party. (*Code*, § 270. *And see Lyme v. Ward, ante, p. 531.*)

Appeal dismissed.

CLICKMAN vs. CLICKMAN.

Motion papers should be entitled in this court, notwithstanding § 274 of the code declaring that "the title of the action shall not be changed in consequence of an appeal." Papers not so entitled cannot be read.

J. J. Tyler, for the respondent, moved to dismiss an appeal. Judgment for the plaintiff, Lawrence Clickman, was entered on the 22d of July last ; and on the 19th of August following, the defendant gave notice of an appeal. The appellant had not caused the return to be filed ; nor had he furnished copies of the case.

N. Hill, Jun., for the appellant, objected that the affidavit on which the motion was founded, and the notice of motion, both mentioned the wrong court. They began thus : "*Supreme court. Lawrence Clickman 2d, respondent, v. Frederick Clickman, appellant,*" when they should have stated the proceeding to be in the court of appeals.

Tyler, in reply, said the entitling of the papers was right, according to the 274th section of the code of procedure.

BRONSON, J. The section referred to declares, that after an appeal the parties shall be known as appellant and respondent ; "but the title of the action shall not be changed in consequence of the appeal." This goes only to "the title of the action," and not to the name or style of the court ; and clearly these

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papers should have mentioned the proceeding as being in the court of appeals, instead of the supreme court. True, the notice states that a motion will be made in the court of appeals; but the notice is given in the supreme court, and as would be proper if the motion was intended to be made in that court.

The court may amend pleadings and proceedings; (*Code*, § 149 ;) but this cannot extend to an affidavit.

In certain cases, an affidavit may be good without a title, or with a defective title. (§ 367.) But this provision relates, I suppose, to the naming of the parties, and not to the name of the court in which the matter is pending, or the proceeding is to be had. And besides, this section does not help the notice.

The papers are not sufficient, and the motion must be denied on that ground.

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See APPEAL, 16, 24.

ANIMALS.

1. The owner of a domestic animal is not in general liable for an injury committed by such animal, unless it be alleged and shown that the defendant had notice of its vicious propensity. *Van Leuven v. Lyke*, 515
2. But if the animal is unlawfully in the close of another, and commits the mischief there, the owner is liable without alleging or proving a *scienter*. *Per JEWETT, C. J.* *id*
3. And in such cases the declaration should be for breaking and entering the close, and the particular mischief, e. g. the killing of another domestic animal, should be alleged in aggravation of the trespass. *id*
4. The declaration in a justice's court alleged that the defendants' sow and pigs mangled and tore a cow and calf of the plaintiff so that they died. The evidence tended to show that the injury was committed as alleged, and that it was done while the sow and pigs were trespassing in the plaintiff's close. *Held* that the plaintiff could not recover for the reason that there was no

allegation or proof of a *scienter*, and no allegation of a breach of the plaintiff's close. *id*

APPEAL.

1. An appeal will not lie from a decision of the court of chancery upon a question of practice addressed to the discretion of that court. *Fort v. Bard*, 43
2. Where a defendant in the court of chancery suffered the bill to be regularly taken as confessed by him, and then, upon affidavits and papers excusing his default and shewing, as his counsel claimed, a good defence on the merits, moved that court to set aside the default and for leave to answer, and the chancellor denied the motion; *held*, that no appeal would lie in such a case, and the appeal brought by the defendant from such a decision was accordingly dismissed on motion. *id*
3. Where a bill was regularly taken as confessed in the court of chancery, and the chancellor, on motion before him, refused to open the default, on the ground that the answer which the defendant sought to put in was not a good defence to the suit on the merits; *held*, that the decision of the chancellor was not the subject of appeal. *Schermerhorn v. The Mohawk Bank*, 125
4. The defendant to a bill in equity put in a demurrer thereto which was overruled by the vice chancellor. On appeal to the chancellor the order was affirmed. The defendant then appealed to this court, and afterwards answered the bill. *Held*, that by answering the appeal was waived. *Brady v. Donnelly*, 126
5. An appeal will not lie to the court of appeals from a decision made in the supreme court, by one justice, at a special term. *Gracie v. Freeland*, 228
6. Where the decree or order appealed from was made before the 1st of July, 1848, when the code of procedure took effect, the right of appeal, the time within which it must be brought, and the form of bringing and prosecuting it, depend upon the law as it stood when the decision was made; but where the decision was after that day, whether in a suit pending on that day,

- or commenced subsequently, the right of appeal, the time within which it must be taken, and the mode of procedure, are regulated by the code. *The Mayor, &c., of New-York v. Schermerhorn*, 423
- . An interlocutory order was made by the supreme court in equity, and notice thereof served 19th May, 1848. An appeal was taken July 24th, 1848; *held*, that such appeal, being barred by the lapse of fifteen days, according to the statute in force before the code of procedure took effect, was too late. *id*
8. An order of the supreme court at general term, denying an application for a rehearing, is interlocutory within the meaning of the statute requiring an appeal to be brought within fifteen days. *id*
9. An order was made by the chancellor on the 23d of June, 1848, denying a motion to vacate a decree and for leave to take proofs. An appeal was brought in the mode prescribed by the code of procedure, on the 11th of July, 1848; *held*, that such appeal should have been made in the form prescribed by the statute and rules in force before the code of procedure took effect. *Spaulding v. Kingsland*, 426
10. *Held further*, that the code of procedure gives no new right of appeal from an order made before it took effect, and that the chancellor's order in question, being upon a matter addressed to his discretion, was not the subject of appeal, according to the previous rule in such cases. *id*
11. When an appeal under the judiciary act of December, 1847, (*Stat.* 1847, p. 639.) was brought prior to the 1st day of July, 1848, from a decision of the supreme court granting a new trial on a bill of exceptions; *held*, that the jurisdiction of the court to hear and determine such appeal was not taken away by the code of procedure. *Butler v. Miller*, 428
12. Whether appeals may still be brought from the decisions of the supreme court on bills of exceptions in cases where the action was pending prior to the first day of July, 1848, *quere*. *id*
13. *It seems*, that the code does not take away a right of appeal which had attached before it went into operation. *id*
14. The judiciary act of December, 1847, (*Stat.* of 1847, p. 639.) authorizing appeals from decisions of the supreme court on bills of exceptions, applies only to cases where the supreme court grants or refuses a new trial before any judgment in the cause; and not to cases where that court reverses or affirms the judgment of a subordinate court. *Brown v. Fargo*, 429
15. Where an appeal is brought under the code of procedure from two orders, an undertaking in the sum of \$250 is not sufficient, although one of the orders embraced in the appeal is made at a special term of the supreme court, and therefore is not appealable to this court. *Schermerhorn v. Anderson*, 430
16. The appellant allowed to amend his undertaking on terms. *id*
17. It rests in the discretion of the court of original jurisdiction to grant, continue, or dissolve a temporary injunction: and therefore a determination upon such a matter is not the subject of appeal to this court. *Van Derwater v. Kelsey*, 533
18. Under the provisions of the code of procedure, there is no right of appeal to this court from an interlocutory determination of the supreme court, e. g. an order dissolving a temporary injunction. *Selden v. Vermilya*, 534
19. An appeal will not lie to this court from an order of the supreme court in general term, denying an application to rehear an order made at a special term, where the order of the special term would not be the subject of appeal to this court, if it had been affirmed by the general term. *Marvin v. Seymour*, 535
20. A motion to compel a party to appear before a master and submit to an examination is addressed to the discretion of the court of original jurisdiction, whose decision, therefore, cannot be reviewed in this court. *id*
21. Where a writ of error was pending in the supreme court when the code of procedure took effect, and that court afterwards rendered judgment of affirmance, there is no right of appeal to this court, the determination of the supreme court being final under the provisions of the code. *Grover v. Coon*, 536

22. A statute, which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect, is not unconstitutional. *id*

23. To render an appeal effectual for any purpose, an undertaking to pay costs and damages, pursuant to the 283d section of the code of procedure, must be executed. An undertaking under the 284th section to pay the sum recovered in the court below and all damages awarded on the appeal, although necessary in order to stay proceedings in the cases mentioned in that section, will not sustain the appeal. *Langley v. Warner*, 606

24. The court cannot amend an undertaking without the consent of the sureties. *id*

25. A final judgment was rendered in the supreme court in May, 1848, before the code took effect. After the code took effect, an appeal was brought according to its provisions. *Held*, that the judgment could be reviewed only by writ of error according to the old law. Appeal dismissed. *Rice v. Floyd*, 608

26. No appeal will lie to this court from a decision of the supreme court granting or refusing a new trial on bill of exceptions, where such decision was made after the first day of July, 1848, when the code of procedure took effect; although the suit may have been commenced prior to that time. *Tilley v. Phillips*, 610

See COSTS, 1.

CONSTITUTIONAL LAW, 3.

APPOINTMENT.

See HUSBAND AND WIFE, 1, 4, 5, 6.

ARBITRAMENT AND AWARD.

See CONTRACT, 2.

ASSIGNMENT.

1. An assignment by a debtor, who is insolvent, of his property in trust for the benefit of a single creditor or surety, containing no provision for the benefit of creditors generally, is not within the act of congress which declares the

United States entitled to priority of payment, "in cases where a debtor not having sufficient property to pay all his debts shall make a voluntary assignment thereof for the benefit of his creditors." *Bouchaud v. Dias*, 201

2. Accordingly, where a debtor made such an assignment of his property, and his surety in certain custom house bonds filed a bill, claiming that the United States had acquired a right to be first paid, and to be subrogated to that right on the ground that as such surety he had been compelled to pay the bonds; *held*, that the bill could not be sustained. *id*

See NON-IMPRISONMENT ACT.

ATTORNEY.

Where the attorney for the plaintiff in error removed from the state, and notice had been given to the party to appoint another attorney pursuant to the statute (2 R. S. 287, § 67,) *held* nevertheless, that a motion to quash the writ of error could not be made, without notice thereof to the plaintiff in error. *Jewell v. Schouten*, 241

B

BAILMENT.

See PLEDGE.

BANKRUPTCY.

1. The bankruptcy of the husband, although it extinguishes the debt as to him, and suspends the legal remedy as to her during the coverture, does not afford any ground for proceeding in equity to charge her separate estate. *Vanderheyden v. Mallory*, 452

2. The creditor in such a case may prove his debt and share in the distribution of the bankrupt's estate. *id*

3. Where the form of the pleadings is such that a party has had no opportunity of setting up fraud in avoidance of a bankrupt's discharge, he may give the fraud in evidence on the trial without having pleaded it. *Ruckman v. Cowell*, 505

4. Accordingly, where a party who was sued in trespass for taking goods, pleaded not guilty and gave notice of justification under a judgment and execution against the plaintiff, and on the trial the plaintiff proved his discharge as a bankrupt obtained after the judgment was rendered; *held*, that the defendant might give fraud in evidence so as to avoid the discharge. *id*

5. In pleading a bankrupt's discharge, the facts on which jurisdiction depends must be averred; but when the discharge is offered in evidence, jurisdiction will be presumed until the contrary appears. *Per BRONSON, J. id*

6. A valid discharge in bankruptcy extinguishes a judgment, so that the creditor who seizes the bankrupt's goods by virtue of the judgment and execution thereon, may be charged as a trespasser, even if he have no knowledge of the discharge. *Per BRONSON, J. id*

7. But otherwise as to the officer making the levy. He is protected by the process regular on its face. *id*

See HUSBAND AND WIFE, 4, 8.

BETTING AND GAMING.

1. The losing party in an illegal bet or wager may recover from the stakeholder the sum deposited by him, although the stakeholder by his direction, given immediately after the wager is determined, has paid the money over to the winner. *Ruckman v. Pitcher, 392*

2. An action to recover money deposited on an illegal wager may be maintained without demand. *id*

3. A wager upon the result of a horse race in Queens county is unlawful, notwithstanding the statutes authorizing and regulating the racing of horses in that county. *id*

4. A party who stakes a sum of money on an illegal wager may recover so much thereof as belongs to himself without joining in the action other persons who contributed specific portions of the fund. *id*

BILL OF EXCEPTIONS.

A bill of exceptions will not lie to review the exercise of the discretion of a circuit judge on the trial of a cause, in disregarding a variance between the declaration and the proof. *Conover v. Insurance Company of Albany, 290*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. One of two partners drew, in the name of his firm, a bill upon the plaintiff, payable to the order of B., and having forged the name of B. as endorser upon the bill, presented it to the Bank of Central New-York, had it discounted in the regular course of business, and applied the proceeds to his private use. The cashier of the bank endorsed the bill and transmitted it to the defendants for collection, and the plaintiff accepted and paid it to the defendants. After discovering that the payee's endorsement was forged, he sued to recover back the money so paid. *Held*, that the action could not be maintained. *Coggill v. The American Exchange Bank, 113*

2. B. the payee, being a stranger to the transaction, and having no interest in the draft, his endorsement was not necessary in order to transfer a good title to the party discounting the paper, or to entitle such party to receive the money upon it. *id*

3. The plaintiff, having accepted and paid the bill under these circumstances, would have a right to charge the amount against the funds of the drawers in his hands, or, if there were none, to maintain an action against them for money paid to their use. *id*

4. The case of *The Canal Bank v. The Bank of Albany*, (1 Hill, 287,) commented upon and approved; but distinguished from this case, inasmuch as there, the endorser whose name was forged, was the owner of the draft, and the only person entitled to receive the money upon it. *Per BRONSON, J. id*

5. It seems that the drawers, after having passed the draft with the payee's name endorsed upon it, and received the avails of it, in an action against them would be estopped from controverting the genuineness of the endorsement. *id*

6. Where a bill is put in circulation by the *drawer*, with the endorsement of the payee forged upon it, a *bona fide* holder may treat it as a bill payable to bearer. *Per* BRONSON, J. *id*
7. In a strict and technical sense, the term *protest*, when used in reference to commercial paper, means only the formal declaration drawn up and signed by a notary, but, in a popular sense and as used among men of business, it includes all the steps necessary to charge an endorser. *Coddington v. Davis*, 186
8. Therefore, where an endorser of a note, before its maturity, wrote to the holder, saying: "Please not protest T. B. C.'s note due, &c. &c., and I will waive the necessity of the protest thereof," *held*, that this dispensed with a demand of the maker and notice to the endorser. *id*
9. A demand of payment from the maker of a note, and notice to the endorser, are sufficient to charge the endorser, without a technical and formal protest. *id*
10. Where a note, specifying no place of payment, was made and endorsed in the state of New-York, but the maker and endorser resided in a foreign country, and continued to reside there when the note fell due, their place of residence being known to the payee and holder, both when the note was given and when it matured; *held*, that presentment of the note to the maker, demand of payment from him, and notice to the endorser, were necessary in order to charge the endorser. *Spies v. Gilmore*, 321
11. F. being indebted to S., in order to obtain further time for payment, executed to him a note payable to the order of S. Before the note was delivered to S., G. endorsed it. The purpose for which the note was made being known to him, and it being part of the arrangement that he should become security for F. *Held*, that G. was liable only as endorser, and not as a joint maker, or as a guarantor. *id*
12. The case of *Hall v. Newcomb*, in error, (7 *Hill*, 416,) referred to, and the doctrine there established, reaffirmed. *id*
13. Due presentment for payment and notice of non-payment are conditions precedent to the liability of an endorser of a promissory note. *Cayuga County Bank v. Warden*, 413
14. No precise form of words is necessary in giving notice. It is sufficient if the language used is such as to convey, either in express terms or by necessary implication, notice to the endorser of the identity of the note, and that payment, on due presentment, has been neglected or refused by the maker. *id*
15. Where a notice misdescribes the note in some particular, it may be shown in aid of the defect that there was no other note in existence to which the description contained in the notice could be applied. *id*
16. A notice of protest need not in terms state that a demand has been made upon the maker. It is sufficient if it state that the note has been protested for non-payment. *id*
17. The defendants were endorsers upon a note for \$600, payable to their joint order at the plaintiffs' bank. The notices of protest were dated at the bank on the last day of grace, and were addressed to the defendants severally. They had the character and figures "\$600" in the margin. In the body they ran thus: "Sir, take notice that S. Warden's note for three hundred dollars, payable at this bank, endorsed by you, was this evening protested for non-payment, and the holders look to you for the payment thereof." It was proved that there was no other note in the bank made by S. Warden and endorsed by the defendants. *Held*, that the notice was sufficient to charge the endorsers. *id*

See INSURANCE, 5, 6, 7.

BONDS.

See OFFICE AND OFFICER, 1, 2, 3.
INDEMNITY.

C

CERTIORARI.

See LANDLORD AND TENANT, 4.

CHALLENGE OF JUROR.

See JUROR.

CHANCERY.

Where a party, claiming an estate by inheritance, files a bill for the purpose of setting aside a will, and dies pending the suit, his devisee may file an original bill in the nature of a bill of revivor and supplement, and if his right as devisee be admitted or established, he will be entitled to the benefit of the proceedings in the original suit. *Brady v. McCosker*, 214

See APPEAL.

PLEADINGS IN EQUITY.

PARTIES TO ACTIONS, 1.

MONEY HAD AND RECEIVED.

COVENANT, 3.

MORTGAGE, 1, 2, 3, 4.

MARSHALLING SECURITIES.

HUSBAND AND WIFE, 1, 2, 4, 5, 6, 9, 10, 11.

CITIES AND VILLAGES.

See SALE FOR TAXES AND ASSESSMENTS.

CLERK IN CHANCERY.

See MORTGAGE, 1, 2, 3, 4.

CONSIDERATION.

See CONTRACT, 3, 4, 5.

INSURANCE, 7.

COVENANT, 3.

CONSTITUTIONAL LAW.

1. Under the new constitution of this state, it is the right and the duty of a judge of the court of appeals to take part in the determination of causes brought up for review from a subordinate court, of which he was a member, and in the decision of which he took part in the court below. *Pierce v. Delamater*, 17
2. The judgment of the supreme court in this case, determining that the act to extend the exemption of personal prop-

erty from sale under execution, passed April 11, 1842, is unconstitutional and void as to debts contracted before its passage, affirmed. *Danks v. Quackenbush*, 129

3. A statute which takes away the right to a future appeal in an action pending and undetermined when the statute takes effect, is not unconstitutional. *Grover v. Coon*, 536

CONSTRUCTION OF INSTRUMENTS.

1. Where two instruments are executed on different days, relating to the same subject matter, and the one last executed refers to and is based upon the former one, in arriving at the intention of the parties in the latter instrument, both should be read and construed together; and the general words, used in the last, should be restricted so as to conform to the intention of the parties as derived from an examination of both instruments. *Coddington v. Davis*, 186
2. Accordingly, where the maker of a note made an assignment to one of the holders for the benefit of his creditors, in which the endorser was named and preferred as a creditor to the amount of the note, and the holders were named and preferred as creditors on another account, but were nowhere set down as creditors in respect to the note, and the holders, in conjunction with other creditors, afterwards executed to the maker an instrument referring to the assignment, and agreeing, in consideration thereof and of one dollar, to discharge the maker from all claims and demands existing in their favor respectively against him, over and above what they might realize under the assignment, on his agreeing at the same time to pay the balance of their debts in seven years, and the maker at the same time gave to the holders his written promise to pay such balance in seven years; held, that the claim of the holders to recover the note of the maker was not discharged or suspended, the instrument being regarded as only applicable to their other demand against the maker; and therefore further held, that their right to recover against the endorser was not affected by such instrument. *id*

See DEED.

LEGACY AND LEGATEE, 3, 4.

LANDLORD AND TENANT, 3.

CONTRACT, 1, 2.

CONTRACT.

1. S. contracted with the corporation of the city of New-York to furnish all the materials and labor necessary to complete the *excavation*, re-filling, and re-paving of a trench of specified dimensions for water pipes. The corporation agreed to pay, as a "*compensation for such excavation*, re-filling, and re-paving," as follows: "For *executing the digging*" and re-filling, seven cents per cubic yard; for re-paving, &c., four cents per square yard. A considerable portion of the trench was excavated through hardpan, and this was proved to be worth 75 cents per cubic yard. Another portion was through rock, worth \$1.00 per cubic yard. It was also shown that seven cents (the contract price) per yard was the lowest price for excavating common earth. *Held*, nevertheless, that S. could recover nothing beyond the contract price, and that extrinsic evidence was not admissible to prove the value of excavating hardpan and rock. *Sherman v. The Mayor, &c., of New-York*, 316

2. The contract provided that, as the work progressed, the engineer of the corporation should, upon the request of the contractor, make estimates of the work done, which estimates were to be paid on the next pay day, less ten per cent; also that when the work was done, the engineer should make a final estimate of all moneys due to the contractor, and then the whole to be paid. The engineer accordingly made a final estimate. It seems, however, competent in such a case, to resort to other proof of the amount of the work. *id*
3. The endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designed for that object. *Trustees of Hamilton College v. Stewart*, 581
4. And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no re-

quest can be implied therefrom against the subscribers that the institution shall perform the services and incur the expenses necessary to fill up the subscription. *id*

5. Accordingly, where the defendant subscribed \$800 to a fund for the payment of the salaries of the officers of Hamilton College, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and contributions should be \$50,000; *held*, that there was no consideration for the undertaking and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition. *id*

See CONSTRUCTION OF INSTRUMENTS.
OFFICE AND OFFICER, 1, 2, 3.
INDEMNITY.
WITNESS, 1, 2.

CONVEYANCE.

See DEED.

CORPORATIONS.

1. Where the charter of an incorporated company provides that the stockholders shall be liable for its debts, and that a creditor may, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover his demand, such stockholders are liable in an original and primary sense, like partners or members of an unincorporated association, and their liability is not created by the statute of incorporation. *Corning v. McCullough*, 47
2. It seems, that on the dissolution of a corporation, the title to real estate held by it reverts back to its original grantor and his heirs, unless there is some provision in the charter, or some other statutory provision to avert that consequence. *Bingham v. Weiderwax*, 509

See LIMITATION OF ACTIONS, 1.

SALE FOR TAXES AND ASSESSMENTS.
INSURANCE, 1, 2.
JURISDICTION, 3, 4, 5.

COSTS.

1. Costs on an appeal to the court of appeals are in the discretion of that court, and when the decree of the court below is reversed, it should be without costs. *Bouchaud v. Dias*, 201
2. A defendant in error, who was prosecuted in the court below for an act done by him as a public officer, is entitled to double costs in error, on the affirmance of the judgment. *Burkle v. Luce*, 239
3. Where the action was commenced before the code of procedure took effect, this court may grant costs on a special motion; and the amount is to be settled by taxation. *Lyme v. Ward*, 531
4. But where the suit is commenced after the code took effect, this court cannot grant costs to the party who makes a special motion. *id*

See PARTIES, 1.
DEFAULT.

COURT OF APPEALS.

See CONSTITUTIONAL LAW, 1.

COURT OF A JUSTICE OF THE PEACE.

The defendant, in a justice's court, claimed the property by virtue of a personal mortgage, which was read in evidence without objection. It also appeared that the mortgage had been filed; but the return of the justice did not show that there was any evidence that such filing was in the town where the mortgagor resided, or where the property was situated, as required by the statute, (*Laws of 1833, chap. 279*), nor did it appear, from the return, that the plaintiff, who claimed the property as purchaser under an execution against the mortgagor, made any objection on the ground of such defect in the evidence; *held*, that such an objection could not be taken in the court of common pleas on *certiorari*. *Jencks v. Smith*, 90

COURTS OF THE UNITED STATES.

See JURISDICTION, 6, 7, 8.

COVENANT.

1. The covenant of seisin, if the grantor has no title, is broken as soon as the deed is executed, and the grantee's right of action upon such covenant becomes immediately perfect. *Bingham v. Weiderwax*, 509
2. Nor is it any defence, either at law or in equity, to such an action, that the premises have been sold and the grantee dispossessed under a mortgage which the grantee assumed to pay, and subject to which he took the conveyance. *id*
3. In the action upon the covenant of seisin, for the purpose of ascertaining the measure of damages, the true consideration, and the fact that only part of it has been paid, may be shown by parol, although the deed expresses a different consideration, and acknowledges that the whole of it has been paid; and there is therefore no occasion, in such a case, to resort to a court of equity for relief. *id*
4. The covenant of seisin is broken if the grantor at the time of the conveyance do not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself. *Mott v. Palmer*, 664
5. Accordingly where the grantor covenanted in the conveyance that he was the lawful owner of the premises and seised of a good and indefeasible inheritance therein, and a quantity of rails erected into fence standing on the premises was the property of another person by virtue of a previous agreement made with the grantor; *held*, that the grantee might maintain an action against the grantor for a breach of the covenant of seisin. *id*

CRIMINAL LAW.

1. A. was indicted in the city of New-York for obtaining money from a firm of commission merchants, in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of and subject to the order of the firm. The defendant pleaded that he was a natural born citizen of Ohio, had always resided there, and had never been within the state of New

York; that the receipt was drawn and signed in Ohio, and the offence was committed by the receipt being presented to the firm in New-York, by an innocent agent of the defendant, employed by him while he was a resident of and actually within the state of Ohio; *held*, that the plea was bad, and that the defendant was properly indicted in the city of New-York.
Adams v. The People, 173

2. Where an offence is committed within this state by means of an innocent agent, the employer is guilty as a principal, though he did no act in this state, and was at the time the offence was committed, in another state. *id*
3. In such case the courts of this state have jurisdiction of the offence, and if the offender comes within the limits of the state, they have also jurisdiction of his person, and he may be arrested and brought to trial. *id*
4. Where an offence is committed within this state, whether the offender be at the time within the state, or be without the state and perpetrates the crime by means of an innocent agent, it is no answer to an indictment that the offender owes allegiance to another state or sovereignty. *id*
5. Under the revised statutes (1 R. S. 665, § 28) it is a misdemeanor to publish in this state an account of a lottery to be drawn in another state or territory, although such lottery be authorized by the laws of the place where it is to be drawn. *Charles v. The People*, 180
6. Accordingly *held* that a demurrer to an indictment which charged the defendant with publishing, in the city of New-York, an account of a lottery to be drawn in the district of Columbia, was not well taken. *id*

See INDICTMENT.

CUSTOM HOUSE.

See MONEY HAD AND RECEIVED.

D

DAMAGES.

See FRAUD, 2, 4, 5.

DEBTOR AND CREDITOR.

See NON-IMPRISONMENT ACT.
 ASSIGNMENT.

DECREE.

See APPEAL, 8.

DEED.

1. Where a deed given in 1829 contained a clause by which it was made subject to a reservation contained in a conveyance of the same premises given in 1793, between other parties, and the question was upon the construction of the deed of 1829; *held*, that it was to be construed in the same manner, as though the language of the reservation as contained in the original deed were incorporated into and formed a part of the one in question. *French v. Carhart*, 96
2. In the construction of deeds and other instruments the intention of the parties is to govern, and where the language used is susceptible of more than one interpretation, courts will look at the surrounding circumstances existing when the contract is entered into, such as the situation of the parties, and of the subject matter of the contract. *id*
3. A conveyance of real estate contained a clause referring to and adopting the reservations and conditions in a former conveyance of the same premises, and the reservation in such former conveyance was in these words: "Saving and always excepting to the said parties of the first part, their heirs and assigns, out of this present grant and release, all mines and minerals, that are now, or may be found within the premises hereby granted and released, and all the creeks, hills, runs and streams of water, and so much ground within the same premises, as they, the said parties of the first part, their heirs and assigns may think requisite and appropriate at any time hereafter, for the erection of the works and buildings whatsoever, for the convenient working of the said mines, and also all such wood, firewood and timber as they may think proper to use in building, repairing, accommodating, and working the said mines, with liberty to them, their heirs, and assigns, and their and each of their

servants to dig through and use the ground, for either of the said purposes, and to pass and repass through the premises, with their and each of their horses and cattle, carriages and servants, and to lay out roads therefor,"—and the habendum clause contained a condition that the grantee, his heirs, &c., should not erect, or permit to be erected, any mill or mill dam upon the stream of water on the premises granted; *held*, that the reservation of the stream was for all purposes and not for mining purposes merely. *id*

4. And in aid of this construction; *held* also, that it was proper to consider the evidence, which showed that when the deed in question was given, the grantor owned the premises immediately below, on which were situated and used a mill and dam, which set the water back on to the land conveyed, and that the grantee knew of the existence of such mill and dam, and of the manner in which the stream was affected by their use. *id*

5. *Held* also, that the reservation was not merely of the natural bed of the stream, but of a right to use the stream in the same manner, and to set back the water to the same extent, as when the grant was made. *id*

6. Whatever is necessary to the fair and reasonable use of the thing excepted, is also reserved as incident to the exception. *id*

7. A reservation, in a deed, of a right or privilege should be construed in the same way as a grant by the owner of the soil, of a similar right or privilege. *Per* JEWETT, C. J. *id*

See EVIDENCE, 1, 2.

COVENANT.

DOWER.

ESTOPPEL.

PAROL EVIDENCE.

DEFAULT.

Where a default is regularly taken in a calendar cause, the court will impose the payment of counsel fee, besides taxable costs, as one of the conditions of setting it aside at a subsequent term. *Slade v. Warren*, 431

See JURISDICTION, 2.

DEMAND.

An action to recover money deposited on an illegal wager may be maintained without demand. *Ruckman v. Pitcher*, 392

See SPECIAL VERDICT, 3, 4.
TROVER.

DEPOSITION.

See EVIDENCE, 7, 8.

DEVASTAVIT.

See EXECUTOR, 3.

DEVISE.

See WILL.

DOWER.

1. In ejectment for dower against a grantee of the husband by *quit claim deed*, or a person holding under such grantee, the defendant is not estopped from showing that the husband was not seized of such an estate in the premises as to entitle his widow to dower. *Sparrow v. Kingman*, 242

2. The cases of *Sherwood v. Vandenburg*, (2 Hill, 303,) *Bown v. Potter*, (17 Wend. 164,) and other similar cases in the supreme court, considered, and in this respect overruled. *id*

DRAWBACK.

See MONEY HAD AND RECEIVED.

E

EASEMENT.

See ADVERSE POSSESSION.

EJECTMENT.

See DOWER.

ELECTION.

See MORTGAGE, 4, 5.
EXTINGUISHMENT, 3.

ENTAILS.

See ESTATES TAIL.

EQUITABLE CONVERSION.

See EXECUTORS, 1, 2.

ERROR.

1. An error in the court below, which on its face could do no possible injury, is no cause for reversing a judgment. But where the error is in the admission of illegal evidence which bears in the least degree on the result, it cannot be disregarded. *Per* JEWETT, C. J. *Worral v. Parmelee*, 519
2. Accordingly, where illegal evidence tending to establish a certain fact was received after objection duly made; *held*, that the error could not be disregarded, although the party objecting afterwards introduced evidence which tended to establish the same fact. *id*

See COSTS, 2.

ESTATES.

See WILL.

ESTATES TAIL.

1. A remainder in fee limited by will to the eldest son of the first taker to whom an intermediate life estate is given, is contingent until the birth of such son; but on the happening of that event before the termination of the life estate it becomes a vested estate in remainder. *Wendell v. Crandall*, 491
2. And where an estate tail in remainder was so limited, and became vested by the birth of a son prior to the act of 1786, abolishing entails; *held*, that by the operation of that act, the estate tail in remainder was converted into a fee simple in remainder, which, on the

death of the remainderman without issue in 1809, and before the termination of the intermediate life estate, descended to his father as his heir at law. *id*

3. One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, where the estate was acquired by purchase, as will constitute him a *stirps* or stock of descent. *id*

ESTOPPEL.

See DOWER.

EVIDENCE.

1. The act of 1833, (*Laws of 1833, ch. 271, § 2*.) in relation to the proof and acknowledgment of written instruments, has not changed the provision of the revised statutes which requires a certificate of the county clerk in order to entitle a conveyance of real estate, proved or acknowledged before a commissioner of deeds or county judge not of the degree of counsellor, to be read in evidence or recorded in any other county than that in which the commissioner or judge resides. *Wood v. Weiant*, 77
2. Accordingly *held*, that a conveyance of real estate, acknowledged before a commissioner in and for the county of Orange, in 1836, could not be read in evidence at the circuit in Rockland county, without the certificate of the clerk of Orange county. *id*
3. Where the original execution upon which a levy had been made was lost, and the supreme court from which it issued ordered, on motion, that a new one like the original be issued as a substitute therefor, that the sheriff's certificate of the levy be endorsed thereon, and that such substituted execution and certificate have the same force and effect as the original would have, and a new execution was issued and endorsed accordingly; *held*, that the same was admissible as primary evidence to prove and justify the levy without showing the loss of the original. *Burkle v. Luce*, 163
4. It seems that where one party receives money from another, and there is no

- explanation of the fact, the presumption is that he receives it because it is his due, and not by way of loan. *Bogert v. Morse*, 377
5. But where a witness testified, that he asked the defendant if he had had any money of the plaintiff, and the defendant replied that he had had twenty dollars of him, and the witness then told the defendant that the plaintiff had requested the witness to speak to him about it, to which the defendant made no reply, but turned away; HELD, that a jury might infer from this evidence that the money was received by way of a loan, and the jury having so found, that their verdict in a justice's court was conclusive. *id*
6. Where the cross-examination of the principal witness for the people was conducted in a manner tending to impair her credibility, and to show that the prosecution was the result of a conspiracy in which she was concerned; held that it was competent to sustain the witness, by showing that another person, to whom the facts had become professionally known, wrote to the public authorities, and was the cause of the prosecution being instituted. *Lohman v. The People*, 380
7. The deposition of a witness taken in a criminal case pursuant to the statute relating to certain offences committed in the city of New-York, (*Stat. of 1844, p. 476, § 11.*) may be read in evidence on the trial of the indictment, on proof that the witness is a non-resident of the city at the time of the trial, and was so when the deposition was taken. *Barron v. The People*, 386
8. Where, however, the only proof preliminary to reading the deposition was the evidence of a person employed by the district attorney to serve subpoenas, who testified that a subpoena was issued to him for the witness whose deposition was offered to be read, that he called at two hotels in the city, where, as he was informed by the district attorney, the witness stopped when he was in the city, that he inquired of the bar-keepers at each of those places, and was informed that the witness was not at either of those places, and did not live in New-York to their knowledge, that he could not find the witness in the city, and did not know where he resided; held insufficient to authorize the deposition to be read. *id*
9. The declarations of a former owner of personal property are not admissible in evidence to prove a sale of such property to a party claiming under him. *Worrail v. Parmelee*, 519
10. And where such evidence was duly objected to, and the party objecting afterwards called as a witness the person whose declarations had been given in evidence, and examined him in regard to the alleged sale; held, no waiver of the objection. *id*
11. The declarations of a person in possession of lands are competent evidence against himself and all persons claiming under him, for the purpose of showing the character of his possession, and by what title he claims. *Pitts v. Wilder*, 525
12. In an action for slander, it is not competent for the plaintiff to introduce evidence of his good character in reply to evidence introduced by the defendant tending to prove the truth of the charge. *Houghtaling v. Kilderhouse*, 530
- See ACTION ON THE CASE.
ADVERSE POSSESSION.
BANKRUPTCY, 3, 4, 5.
CONTRACT, 1, 2.
ERROR.
INDICTMENT, 4.
INSURANCE, 2.
JURISDICTION, 3, 4.
JUROR.
PAROL EVIDENCE, 1, 2.
SLANDER.
TROVER.
WITNESS.
- EXCEPTION.
- See BILL OF EXCEPTIONS.
ERROR.
TRIAL.
- EXECUTION.
- See BANKRUPTCY, 6, 7.
CONSTITUTIONAL LAW, 2.
EVIDENCE, 3.
EXTINGUISHMENT, 3.
MORTGAGE OF CHATTELS, 1, 2.
PLEDGE.
REPLEVIN, 1.

EXECUTORS.

1. Where a testator devised and bequeathed all his real and personal estate to his executors, in trust, to sell the same whenever they should see fit; also with authority to lease the same, and directed the executors to divide the whole trust estate into nine equal parts, and pay over and convey one of said parts to each of his four children who were of age, and to hold the remaining five parts until his minor children should respectively become of age, and to pay over and convey to them their shares as they should become of age; *held*, that the executor could be compelled to account before the surrogate, not only for the personal estate bequeathed to him, but also for the rents and profits of the real estate, and for the proceeds of such real estate as he had sold pursuant to the directions contained in the will. *Stagg v. Jackson*, 206
2. It seems, upon the doctrine of equitable conversion, that under such a will the whole estate is to be considered as personal estate from the death of the testator, so that the rents and profits of the real estate received by the executor, and the proceeds of a sale thereof made by him, become legal assets in his hands, for which he is bound to account as personal estate. *id*
3. An executor, who was also a devisee and legatee, died insolvent, having wasted a large portion of the estate, and leaving unpaid a debt against the testator, and also a judgment against himself for a debt in no way connected with the estate, which judgment was a lien on his share as devisee in certain real estate of the testator. His co-devisees and legatees were his heirs at law, and as such took his share in the real estate; and having paid the whole debt against their testator, they filed their bill against the judgment creditor of the deceased executor, claiming to be substituted to the lien of the creditor whom they had paid, upon the executor's share in such real estate, and to restrain the sale thereof by the judgment creditor; also claiming a lien thereon in consequence of the *devastavit* of which the executor had been guilty. *Held* that the bill could not be sustained. *Wilkes v. Harper*, 586

See POWER.

LEGACY AND LEGATEE, 7.

EXECUTORS AND ADMINISTRATORS.

See JURISDICTION, 5.

EXEMPTION ACT.

See CONSTITUTIONAL LAW, 2.

EXTINGUISHMENT.

1. A judgment confessed by the mortgagor to the mortgagee for the same debt secured by a personal mortgage, does not merge or extinguish the mortgage, where by agreement the judgment is taken as collateral merely. *Buller v. Miller*, 496
2. And even where there is no agreement that the judgment shall be held as collateral, *quere*; whether a judgment for the debt can work an extinguishment of the mortgage. The case of *Buller and Vosburgh v. Miller*, (1 *Denio*, 407,) referred to and questioned in this particular. *id*
3. But where execution upon a judgment confessed for the mortgage debt was issued, and levied upon the chattels mortgaged, which were advertised for sale thereunder, and after the same property was sold upon another execution against the mortgagor, the mortgagees moved the supreme court for an order directing the sheriff to apply the proceeds of the sale upon their execution; *held*, in an action of trover by the mortgagees against the sheriff who made the sale, that these acts were repugnant to any claim under the mortgage, and precluded the plaintiffs from so claiming the property. *id*

See BANKRUPTCY, 6.

F

FALSE PRETENCES.

See CRIMINAL LAW, 1.

FIXTURES.

It seems that rails built into fence by a tenant, under an agreement that he

may remove them from the land, are, as between such tenant and the owner of the soil, personal property. *Mott v. Palmer*, 564

See COVENANT, 4, 5.

FORGED ENDORSEMENT.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1, 2, 3, 4, 5, 6.

FORMER SUIT.

See INDORSEMENT, 4.
JURISDICTION OF CHANCERY, 6, 7.

FRAUD.

1. Where one conveys or leases to another his right in real estate, an action will lie for a fraudulent representation as to the territorial extent of such right. *Whitney v. Allaire*, 505
2. And in such a case the proper measure of damages in favor of the lessee is the sum which in good faith he is obliged to pay a third person to obtain what the lease would have given him if the representation had been true. *id*
3. A demise for a term commencing *in futuro* passes a present interest in the term to the lessee. *id*
4. And the lessee by taking possession at the commencement of the term, and after having discovered the fraud waives thereby only his right to rescind the contract, but not his right to recover the damages occasioned by the fraud. *id*
5. The defendant, in February, executed to the plaintiff a writing under seal, stating that he had hired of the plaintiff a certain water lot and his right to a wharf in the city of New-York, for one year from the first of May next, at \$1000 rent. He was induced to make the contract through the fraudulent representations of the plaintiff, that the right mentioned in the lease comprehended a parcel of land which in fact belonged to the corporation of the city of New-York. The defendant discovered the fraud before the first of May, and obtained from the corpora-

tion a lease for that parcel at an annual rent of \$1000. On the first of May he took possession of the whole and occupied during the year. In covenant for the rent; *held*, that he was entitled to a deduction by reason of the fraud, of the sum which he was obliged in good faith to pay for the corporation lease. *id*

6. *It seems*, that an action will lie for a fraudulent representation by which a party is induced to enter into a contract which is executory merely. *Per GARDINER, J.* *id*

7. *It seems* also, that where one conveys or leases real estate, an action will lie for a fraudulent representation *as to the title*. *id*

8. It seems, that the question of fraud in a personal mortgage should be submitted to the jury, although no change of possession accompanies the mortgage, and the verdict of the jury in favor of the *bona fides* of the transaction will be as conclusive as upon any other question of fact. *Buller v. Miller*, 496

See PARTIES TO ACTIONS, 1.

FRAUDS, STATUTE OF.

1. Plaintiff and defendant bargained respecting the sale, by the former to the latter, of a quantity of lumber, piled apart from other lumber, on a dock and in view of the parties at the time of the bargain, and which had before that time been measured and inspected. The parties having agreed as to the price, the plaintiff said to the defendant, "*the lumber is yours.*" The defendant then told the plaintiff to get the inspector's bill, and take it to one House, who would pay the amount. This was done the next day, but payment was refused. The price was over fifty dollars. *Held*, in an action to recover the price, that there was no delivery and acceptance of the lumber, within the meaning of the statute of frauds, and that the sale was therefore void. *Shindler v. Houston*, 261
2. It seems that to constitute a delivery and acceptance of goods, such as the statute requires, something more than mere words is necessary. Superadded to the language of the contract, there must be some *act* of the parties,

amounting to a transfer of the *possession*, and an acceptance thereof by the buyer. The case of cumbrous articles is not an exception to this rule. *id*

G

GROWING CROPS.

See PROPERTY.

GUARANTY.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 11, 12.
SUBROGATION, 2, 3.

H

HUSBAND AND WIFE.

1. The separate estate of a married woman is not liable at common law for her debts contracted before marriage; and the only ground on which it can be reached in equity, is that of appointment, i. e. some act of hers *after marriage* indicating an intention to charge the property. *Vanderheyden v. Mallory*, 452
2. The bankruptcy of the husband, although it extinguishes the debt as to him, and suspends the legal remedy as to her during the coverture, does not afford any ground for proceeding in equity to charge her separate estate. *id*
3. The creditor in such a case may prove his debt and share in the distribution of the bankrupt's estate. *id*
4. A *feme sole*, having contracted a debt, and owning some shares of bank stock, married. After marriage, the stock, with the consent of the husband, was transferred to a third person for the purpose of having it transferred back to her for her sole and separate use, which was accordingly done. She also held other shares of bank stock which had been transferred to her separate use by the executor of her father's estate. The creditor sued the husband and wife at law, and being met by a plea of the husband's bankruptcy, discontinued. He then filed a bill in equity for the purpose of reaching the bank stock. No fraud in the transfer

to the wife's separate use being alleged, nor any act of the wife after marriage indicating an intention to charge this fund; *held*, that the bill could not be sustained. *id*

5. *It seems*, that when a debt is contracted by a woman during coverture either for herself or as surety for her husband, this will be *prima facie* evidence of an appointment or appropriation of her separate estate to the payment of the debt. *id*
6. But this doctrine has no application where the debt was contracted by the woman before marriage. The act of marriage does not raise an appointment; nor does a promise by her and her husband to pay the debt out of some other fund not conveyed to her separate use, e. g. a legacy or distributive share in her former husband's estate, enable the creditor to reach her separate estate. *id*
7. The law casts upon the husband a temporary liability for the debts of the wife contracted before marriage. This liability ceases with the *coverture*, unless judgment has been recovered against both. If the wife survive the husband, and judgment has been recovered, her sole liability revives. *Per* JEWETT, C. J. *id*
8. The bankruptcy of the husband extinguishes the liability as to him; but it revives against the wife if she survive her husband. *Per* JEWETT, C. J. *id*
9. Where real estate was purchased and paid for in part with the money or funds of the husband, and with his assent the conveyance was taken to a trustee who simultaneously gave a mortgage on the estate for the residue of the purchase money, and also with the husband's assent executed a declaration of trust to the effect that the premises were held to the sole and separate use of the wife, subject to the mortgage; *held*, the rights of creditors not being in question, that the declaration of trust was valid and binding upon the husband, and that the husband had no interest in such estate. *Martin v. Martin*, 473
10. Where real estate of a wife which is held subject to the marital rights of her husband is sold, the proceeds of such sale, being money or personal property,

- belong to the husband, subject only to the equitable right of the wife to a support therefrom; and equity will not interpose in such a case in her favor, where suitable provision is otherwise made for her, or where she is living in a state of unjustifiable separation from her husband. *id*
11. Accordingly, where the wife owned a dower interest in four-sixths of certain real estate of which her former husband died seized, and owned in fee the remaining two-sixths, and the husband and wife united in a sale, and out of the proceeds of such sale the sum of \$3,000 was paid, without the husband's assent, upon a mortgage which encumbered the wife's separate estate: *held*, that the husband had a claim upon such separate estate to that extent. *id*
12. But another sum of \$2,000 out of such proceeds appearing to have been paid upon the same mortgage with the husband's unqualified assent; *held*, that such payment was a valid appropriation of that sum to the wife's separate use, and that in respect to it the husband had no claim upon the separate estate. *id*
3. And in such cases a judgment recovered against the party indemnified, on account of the acts or neglect of another for which he is answerable, without payment of the judgment, or some part thereof, does not entitle him to sustain an action against the indemnitors. *id*
4. A deputy sheriff and his sureties executed to the sheriff a bond, conditioned that the deputy should so demean himself in all matters touching his duty, that the sheriff should not sustain any damage or molestation by reason of any act done or liability incurred by or through such deputy. The sheriff was sued and judgment recovered against him for a default of the deputy in not returning an execution. Other judgments were also recovered against him and his sureties upon bonds given to discharge himself from arrest under attachments issued against him for not returning other executions in the hands of the deputy. No part of the judgment having been paid by the sheriff, and no actual damage being shown, *held*, that there was no breach of the bond of the deputy and his sureties, and that the sheriff could not maintain an action thereon. *id*

I

ILLEGAL CONTRACT.

See BETTING AND GAMING, 1, 2, 3.
OFFICE AND OFFICER.
WITNESS, 1, 2.

IMPRISONMENT FOR DEBT.

See NON-IMPRISONMENT ACT.

INDEMNITY.

1. In contracts of indemnity, where the obligation is to perform some specific thing or to save the obligee from a charge or liability, it seems the contract is broken when there is a failure to do the specific act, or when such charge or liability is incurred. *Gilbert v. Wyman*, 550
2. But where the obligation is that the party indemnified shall not sustain damage or molestation by reason of the acts or omissions of another, or by reason of any liability incurred through such acts or omissions, there is no breach until actual damage is sustained. *id*
3. Where the indictment charged the defendant with publishing an account of an illegal lottery, and set forth *in hæc verba* the lottery scheme, which showed that the prizes consisted of sums of money; *held good*, although it was not otherwise averred that the lottery was set on foot for the purpose of disposing of money, land, &c. *Charles v. The People*, 180
4. Mere surplusage in an indictment will not vitiate, and therefore where an indictment alleges facts which constitute a misdemeanor, it will be good for that offence, although it state other facts which go to constitute a felony, provided all the facts alleged fall short of the charge of felony in consequence of some other facts essential to that charge, e. g. the intent of the party ac-

caused not being averred. *Lohman v. The People*, 379

3. By statute (*Laws of 1845, ch. 260, § 2*) it is a misdemeanor to administer drugs, &c., to a pregnant female *with intent to produce a miscarriage*; and by statute (*Laws of 1846, ch. 22, § 1*) it is manslaughter to use the same means *with intent to destroy the child*, in case the death of such child be thereby produced. The indictment charged all the facts necessary to constitute the crime of manslaughter, except the intent with which the acts were done, and in its conclusion it characterized the crime as manslaughter; but the only intent charged was an *intent to produce a miscarriage*: HELD, that the indictment was fatally defective for the felony, but good for the misdemeanor, and that the accused was properly convicted of the latter offence. *id*

4. A conviction for a misdemeanor under such an indictment would, it seems, be a bar to a subsequent indictment for the felony. The record would be conclusive evidence that the acts were done with the intent alleged in the indictment, and therefore the people could not allege a different intent, so as to constitute a different offence. *id*

See CRIMINAL LAW.

INJUNCTION.

See APPEAL, 17, 18.

INSOLVENT CORPORATIONS.

See JURISDICTION, 3, 4, 5.

INSURANCE.

1. Where a policy of insurance prohibited an assignment of the interest of the assured, "unless by the consent of the company manifested in writing," and the secretary, on an application to him at the office of the company, endorsed upon the policy and subscribed a consent, it seems that his authority to do so, in the absence of evidence to the contrary, should be presumed. *Conover v. Insurance Co. of Albany*, 230
2. But if it were necessary to prove his authority, a formal resolution of the

board of directors need not be shown. Evidence that the secretary, he being the sole agent of the company in transacting business at their office, has been in the uniform habit of giving such consent, in writing, and made regular entries of his acts in the books of the company, without any objection or repudiation on the part of the company, is enough at least to carry the question of authority to the jury. *id*

3. A mortgage given by the insured upon the property covered by the policy, is not an *alienation by sale or otherwise*, within the meaning of the seventh section of the charter. (*Laws of 1836, p. 315 and 44.*) *id*

4. And notwithstanding such mortgage, and an assignment of the policy to the mortgagee, with the consent of the company, a suit upon the policy to recover for a loss must be brought in the name of the insured. *id*

5. Where the charter of a mutual insurance company authorized such company, "for the better security of its dealers," to receive premium notes in advance, of persons intending to take policies, and to negotiate such notes for the purpose of paying claims or otherwise, in the course of its business, and to pay to the makers of such notes a compensation not exceeding five per cent per annum, on so much of the notes as exceeded the premiums on policies actually taken; held, that a note taken by the company in pursuance of its charter for premiums in advance, was valid and effectual for the whole face thereof, although the premiums on insurances actually received by the maker, amounted to only a part of such note. *Deraismes v. The Merchants' Mutual Ins. Co.* 371

6. It seems, that a notice so given is valid by force of the statute authorizing it to be taken, and therefore that a partial failure of consideration cannot be set up to defeat a recovery of the full amount. *id*

7. But if a consideration is necessary, the concurrence of others in giving similar notes for the purpose of giving a credit to the company in pursuance of an agreement entered into by all the makers; the contemplated advantages of insurance in such company, and the compensation authorized to be paid to the makers on such an amount as the

notes should exceed the premiums on insurances actually taken, constitute a sufficient consideration to uphold such a note *id*

J

JUDGMENT.

See EXTINGUISHMENT.

JURISDICTION.

1. The court of appeals does not lose jurisdiction of a cause brought up by writ of error, until the *remittitur* is actually filed with the clerk of the court below. *Burkle v. Luce*, 239
2. Where after affirmation of the judgment of the court below, a *remittitur* has been sent to and filed with the clerk of that court, this court loses jurisdiction of the cause, so that it cannot open a default therein. *Martin v. Wilson*, 240
- 3 By statute (2 R. S. 464, §§ 41, 42; *id* 469, §§ 67, 68, 72; *id* 43, § 12) whenever a receiver of an insolvent corporation "shall show by his own oath or other competent proof," that any person is indebted to the corporation, or has property of the corporation in his custody or possession, the officer to whom the application is made shall issue a warrant to bring such person before him for examination. Under this statute it is sufficient for the receiver, who applies for a warrant, to swear to the facts, on information and belief. *Noble v. Halkiday*, 330
- 4- Accordingly *held*, where the receiver of an insolvent corporation applied for a warrant under the above statute, and showed the facts only by his own oath on his information and belief, and a warrant was issued upon which the person proceeded against was taken and brought before the officer; *held*, in an action brought by such person against the receiver and others acting under the warrant for an assault and battery and false imprisonment, that the warrant was a good justification. *id*
5. Under the above statute, a person having in his custody as administrator of a deceased person, effects of the corporation, or indebted as such administrator, is liable to be proceeded against;

and where the sworn petition, on which the warrant was granted, stated that such person had property of the corporation in his custody, either individually or as administrator, &c., held good. *id*

6. The circuit and district courts of the United States, though of limited jurisdiction, are not inferior courts in the technical sense of the term. *Per BRONSON, J. Ruckman v. Cowell*, 505
7. Trover may be maintained in the courts of this state against a postmaster for improperly detaining a newspaper, although such detention is under color of the laws of the United States and the regulations of the post office department. *Teall v. Felton*, 537
8. The question, when the jurisdiction of the federal courts is exclusive and when concurrent with that of the state courts, considered. *id*

See BANKRUPTCY, 5.
CRIMINAL LAW, 1, 2, 3, 4.
EXECUTORS, 1.
JURISDICTION OF CHANCERY.

JURISDICTION OF CHANCERY.

1. A court of equity will not entertain jurisdiction to set aside a will of real estate for fraud, or on the ground of the testator's incompetency, where there is a perfect remedy at law, and the objection to the jurisdiction is taken in due season. *Brady v. McCosker*, 215
2. But where the party, claiming in hostility to the will is not in possession, and an impediment exists which would prevent a recovery at law of the whole or any part of the estate devised, a bill in equity will be entertained to have the will declared void and delivered up to be cancelled. *id*
3. Accordingly, where a bill was filed for the purpose of setting aside a will on the ground of fraud and undue influence, and it appeared that, at the filing of the bill, the complainant was not in the actual possession of the estate, and that a trust term in such estate, which vested the legal title in trustees, was yet unexpired, so that no recovery could be had in ejectment; *held*, that a demurrer to the bill for

want of jurisdiction was properly over-
ruled. *id*

4. So also it is a good answer to an objection for want of jurisdiction, that a part of the estate devised is subject to an unexpired lease, under which the lessee or his assignee is in possession. *id*

5. And where the bill distinctly showed the existence of an unexpired trust term, and that a part of the estate was occupied by the assignee of an unexpired lease, and the other parts were occupied by persons under an agent, who had assumed the control and management of the property for the benefit of such party as should be entitled thereto, when the question upon the validity of the will should be settled; *held*, that an objection for want of jurisdiction would not lie, although the bill in another place alleged that the complainant was entitled to the whole estate by inheritance in fee simple, and that he "*held and was in lawful possession thereof*," this allegation being regarded as a formal legal conclusion from the facts specifically set forth in the other parts of the bill. *id*

6. The complainants were sureties for C. upon a note given to J. for a usurious loan of money. An action at law was brought upon the note against the complainants, and C. in the name of P., as endorsee. The complainants pleaded the general issue, and gave notice of the defence of usury, but did not verify the notice as required by the usury act of 1837, so as to entitle them to examine the plaintiff as a witness. On the trial they called as a witness, J., the payee of the note, who stated, on his *voire dire*, that he was the owner of the note and the plaintiff in interest, and objected to testifying in the cause, and his objection was sustained by the court. A verdict was taken for the amount equitably due on the note, and judgment was perfected against the complainants and C.; *held*, that a bill filed by the complainants, *after judgment at law*, for the purpose of obtaining the testimony of C., and for relief against the judgment on the ground of usury, could not be sustained. *Vilas and Bacon v. Jones and Piercy*, 274

7. *Held further*, that after judgment at law, the bill could not be sustained on the ground that the complainants, as

sureties, were discharged by reason of the holder of the note having extended the time of payment to the principal debtor in consideration of a usurious premium paid by him in advance, it not being shown that the complainants were prevented from setting up this defence in the action at law, by any fraud or accident, or by the act of the opposite party. *id*

See MONEY HAD AND RECEIVED.

JUROR.

A juror being challenged to the favor testified before the triers, that he had formed no opinion and had no impressions as to the guilt of the prisoner, but that it had been and was still his impression that the general character of the prisoner was bad. The question was then put to the juror whether he would disregard what he had heard and read, and render his verdict according to evidence. Objected to, and exception taken. *Held*, that the question, although inartificially put, substantially called for the consciousness of the juror as to his ability to try the cause impartially, and therefore that it was properly allowed. *Lohman v. The People*, 380

L

LANDLORD AND TENANT.

1. Where A. occupied land under H., and by the terms of their agreement, the grass belonged to A.; *held*, that A. might transfer such grass while yet growing, by a personal mortgage. *Jencks v. Smith*, 90
2. A demise for a term commencing in *futuro* passes a present interest in the term to the lessees. *Whitney v. Alaire*, 305
3. A. executed to B. a lease of certain premises for one year, containing a clause in these words: "B. to have the privilege to have the premises for one year, one month and twenty days longer, but if he leaves he is to give four months notice before the expiration of this lease." *Held*, that the lease created a term for the full period of two years, one month and twenty

days, defeasible at the election of the tenant, after one year, by giving notice of his intention to leave the premises, four months previous to the expiration of the year. *Charles v. Dokey*, 419

4. Where the landlord obtains possession of the demised premises by summary proceedings which are reversed in the supreme court upon *certiorari*, that court should not award restitution to the tenant, if the term has expired before the judgment of reversal is rendered. *id*

See FIXTURES.

FRAUD, 1, 2, 3, 4, 5, 6, 7.

LEASE.

See FRAUD, 1, 2, 3, 4, 5, 6, 7,
LANDLORD AND TENANT, 2, 3.

LEGACY AND LEGATEE.

1. The general rule is, that the personal estate of a testator is the primary fund for the payment of legacies, and a testator is presumed to act upon this legal doctrine, unless a contrary intent is distinctly manifested by the terms and provisions of the will. *Hoes v. Van Hoesen*, 120
2. Where the personal estate is not in terms exonerated, and is not specifically given away by the will, it will be deemed the primary fund for the payment of legacies, notwithstanding such legacies, by the terms of the will, are expressly charged upon the persons to whom the real estate is devised. The charge upon the devisees in such a case will be deemed in aid, and not in exoneration of the primary fund. *id*
3. A testator gave to his wife the use of his real and personal estate during her widowhood; to two of his sons he devised the reversionary interest in his real estate, and directed them to pay legacies to his other son and to his daughters; but made no disposition of the reversionary interest in the personal estate; *held*, that such reversionary interest in the personal estate was the primary fund for the payment of the legacies. *id*

4. A testator by his will, made in 1804,

gave all his real and personal estate to his wife during her life, and after her death to his grandson. To his granddaughter he gave a legacy, to be paid by his grandson, "out of the estate," in one year after he should become of age. The grandson became of age in 1820, but the widow's life estate did not terminate till 1832; *held*, that the legacy was not payable until the latter period, and therefore that a bill filed soon afterwards, to recover the legacy, was not liable to a presumption of payment from lapse of time. *Dodge v. Manning*, 298

5. The grandson, in 1826, mortgaged the real estate which he took under the will, and portions of it were purchased by the respondents, with notice of the legacy, at a sale upon the foreclosure of the mortgage. Upon bill filed by the legatee against the respondents and the grandson, *further held*, that the grandson, by accepting the estate, became personally liable for the legacy, that the legacy was an equitable charge upon the real estate, but that the respondents should not be charged in respect to the real estate in their hands, except in case of a deficiency after the remedy should be exhausted against the grandson. *id*
6. Co-legatees in no sense sustain to each other the relation of surety in respect to the testator's debts, each being liable only in proportion to the amount of his legacy. *Wilkes v. Harper*, 536
7. Legatees, whose shares of the personal estate of the testator have been wasted by the executor, have no lien upon the real estate devised to such executor to make good their loss. *id*

LIEN.

See EXECUTOR, 3.

LEGACY AND LEGATEE, 7.

LIMITATION OF ACTIONS.

1. A suit against a stockholder of a corporation, to charge him individually with a debt contracted by it, pursuant to a provision in the act of incorporation, is not an "action upon a statute, for a forfeiture or cause, the benefit and suit whereof, is limited to the party aggrieved," and therefore is not

barred by the three years' limitation prescribed in the statute, (2 R. S., 298, § 31,) for actions of that class. *Corning v. McCullough*, 47

2. The period of six years is the only limitation provided for suits of this description. *id*

3. It seems that the short statute of limitations above referred to, is intended only to embrace penalties and forfeitures, properly so called, and other causes of action penal in their nature, and where both the cause of action and the remedy are given by statute; but does not extend to cases where the action is partly given by the common law and partly by statute. *id*

LOAN.

See EVIDENCE, 4, 5.

LOTTERIES.

See CRIMINAL LAW, 5, 6.
INDICTMENT, 1.

M

MANSLAUGHTER.

See INDICTMENT, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE.

MARSHALLING OF SECURITIES.

The equitable doctrine in regard to marshalling securities is applicable only where one party has a lien upon or interest in two funds, with a right to resort to either or both, and another party has a lien upon or interest in only one of those funds. *The Farmers' Loan and Trust Co. v. Wabworth*, 433

MERGER.

See EXTINGUISHMENT.

MISLEMEANOR.

See INDICTMENT, 2, 3, 4.

MONEY HAD AND RECEIVED.

1. The defendant imported into the city of New-York goods on which the collector of customs exacted and received duties. The goods were by law entitled to a drawback of the duties in case they were exported within three years. The defendant sold the goods to the plaintiff at the "long price," which by custom and agreement included the amount of duties paid, and carried to the purchaser the right to the drawback. Afterwards, and while the plaintiff yet owned the goods and could export them so as to get the drawback, or could sell them in market at the "long price," the secretary of the treasury decided that goods of that kind were *duty free*, and thereupon the duties were refunded to the importer. In consequence of such decision the right to a drawback was extinguished, and the market price of the article was immediately reduced by about the amount of duties which had been exacted. *Held*, on bill filed to recover the amount of duties returned to the defendant, there being no fraud in the case, and no warranty that the goods were dutiable, and no allegation that the plaintiff intended to export the goods, that the plaintiff could not recover. *Moore v. Des Arts*, 359

2. *Quere*, whether, in case the plaintiff had a right to recover the money, the remedy would not be at law. *id*

See OFFICE AND OFFICER, 3.

MONEY LENT.

See EVIDENCE, 4, 5.

MONEY PAID.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

MORTGAGE.

1. Where moneys deposited in the court of chancery, in a suit for the partition of lands, have been invested by the

clerk upon bond and mortgage executed to him in his official character, such clerk has no power to discharge the mortgage without the order of the court. *The Farmers' Loan and Trust Co. v. Walworth*, 433

he bids to the value of the equity of redemption only; and the land becomes from thenceforth the primary fund for the payment of the debt secured by the senior mortgage. *Mathews v. Atkin*, 595

See SUBROGATION, 3.

MORTGAGE OF CHATTELS.

2. And it seems, that where the clerk executes such a discharge without actual payment, and without the order of the court, it is void even as against *bona fide* purchasers of the property encumbered by the mortgage. *id*

3. But the unauthorized act of the clerk, in executing such discharge, may be ratified by the owners of the fund secured by the mortgage. *id*

4. One of the clerks in chancery loaned upon bond and mortgage the sum of \$29,000, which had been paid into that court to secure a widow's dower, in pursuance of a decree in partition. Afterwards, the borrowers executed to the clerk another bond for the same sum, and another mortgage upon *different* property. These securities were intended as a substitute for the first bond and mortgage, and were so received by the clerk, who, thereupon, without any direction of the court, executed a satisfaction of the first mortgage, which was entered of record. The owners of the fund, (after the death of the widow,) with notice of all the circumstances, foreclosed the second mortgage, in the name of the clerk, and had the property sold. *Held*, that although the discharge of the first mortgage was void, and might have been treated as a nullity, yet the election of the owners of the fund to proceed upon the substituted security, was a ratification of the acts of the clerk, and therefore, that a bill filed to foreclose the first mortgage, for the purpose of collecting the residue of the money not realized by the first foreclosure, could not be sustained. *id*

5. It seems, that if the owners of the fund had elected to proceed upon the first mortgage, the appellants, who were *bona fide* purchasers of the property covered thereby, would have been entitled to the second mortgage for their indemnity. *id*

6. Where real estate is incumbered by two mortgages, and the holder of the junior one forecloses and purchases in the property, the presumption is that

1. Where, in a mortgage of personal property, it was provided that the mortgagor should permit the mortgagee to "have, possess, occupy, and enjoy," the mortgaged property, whenever he should demand the same, and after the mortgagor had absconded, the mortgagee took possession of the property by virtue of the mortgage; *held*, that the interest of the mortgagor was not the subject of levy upon execution, although the debt secured by the mortgage had not, at the time of the levy, become due. *Mattison v. Boucus*, 295

2. It seems that the interest of a mortgagor of personal property, even before forfeiture, where he has not the right of possession for a definite period, is but a right of redemption merely, which is not the subject of levy and sale upon execution. *id*

3. It seems, that a personal mortgage transfers to the mortgagee the whole legal title to the thing mortgaged, subject only to be defeated by the performance of the condition. *Butler v. Miller*, 496

See EXTINGUISHMENT.
FRAUD, 8.
PROPERTY.

MOTION.

See PRACTICE, 3.

MULTIFARIOUSNESS.

See PLEADINGS IN EQUITY.

N

NON-IMPRISONMENT ACT.

1. The assignment, which a debtor, proceeded against under the non-impris-

sement act, executes pursuant to the provisions of that act, (*Stat.* 1831, §§ 16, 17,) is for the benefit of the creditor who institutes the proceeding, and not of the creditors generally. *Spear v. Wardell*, 144

2. And a voluntary assignment, executed by such debtor, while the proceeding is pending against him, of all his property for the benefit of all his creditors without preference, is a fraud upon the act and the rights of the prosecuting creditor. *id*

3. Where a judgment creditor instituted a regular and valid proceeding under the non-imprisonment act, and the debtor, while the proceeding was pending, executed a voluntary assignment of all his property for the benefit of his creditors generally without preference, so that no property passed into the hands of the statutory assignee under the statutory assignment subsequently made; *held*, upon a bill filed by the creditor against the debtor and the voluntary assignee, that the voluntary assignment should be allowed to stand, but the assignee should be decreed to hold the property assigned, as a trustee for such creditor to the extent of his demand. *id*

4. *Held*, also, that the title to the property having passed to the voluntary assignee, the statutory assignee had no interest, which made it necessary to join him as a party to the bill. *id*

NOTICE.

See *ANIMALS*.

NUISANCE.

1. In the common law action by writ of nuisance, as retained and regulated by the revised statutes, it seems that the declaration must show that the plaintiff has a freehold estate in the premises affected by the nuisance. This is a real action. *Cornes v. Harris*, 223

2. But in an action on the case for damages merely, sustained in consequence of the erection of a nuisance, it is enough that the plaintiff is in possession of the premises affected thereby. *id*

3. The plaintiff commenced his action by writ of nuisance pursuant to the statute. (2 R. S. 332.) The formal commencement of the declaration was appropriate to that action and referred to the writ; but the declaration contained no averment that the plaintiff had a freehold estate in the premises affected by the nuisance. It showed, however, a good cause of action on the case, and concluded thus, "to the nuisance of said dwelling house and premises of the plaintiff and to his damage of five thousand dollars:" *held*, that it was a good declaration in an action on the case, although it showed no ground of recovery in the action of nuisance proper; and therefore, that the supreme court was right in denying a motion made after verdict in arrest of the judgment. *id*

O

OFFICE AND OFFICER.

1. The policy of the law in declaring void bonds, agreements, &c., taken by sheriffs and other officers *colore officii* not in conformity with statute, is to guard against official oppression on the one side, and a lax performance of duty to the injury of the plaintiff in the process on the other. *Winter v. Kinney*, 365

2. An agreement made with a sheriff by which a party under arrest is permitted to go at large upon any terms other than those prescribed by statute is void. And so is any agreement taken from a party in custody intended as an indemnity to the sheriff for a breach of duty. *id*

3. But the prohibition extends only to the officer, and not to the plaintiff in the process. Therefore, where a party under arrest was permitted to go at large, upon depositing with a third person the sum of money for which he was arrested, under an agreement, that if he did not surrender himself at a given time, the money might be paid over to the plaintiff in the process; *held*, in an action to recover back the money from the person with whom it was deposited, that the question was, whether the agreement was made with the officer, or with the plaintiff at whose suit the arrest was made; and upon the evidence, that question directed to be submitted to the jury. *id*

4. The act of a public officer exceeding the authority conferred on him by law may be adopted by the party for whose benefit it is done. *Per BRONSON, J. The Farmers' Loan and Trust Co. v. Walworth*, 433

See BANKRUPTCY, 7.
COSTS, 2.
JURISDICTION, 7.
MORTGAGE, 1, 2, 3, 4.
POSTMASTER.

ORDER.

See APPEAL, 8.

P

PAROL EVIDENCE

1. In the construction of deeds and other instruments, the intention of the parties is to govern; and where the language used is susceptible of more than one interpretation, courts will look at the surrounding circumstances existing when the contract is entered into, such as the situation of parties and of the subject matter of the contract. *French v. Carhart*, 96
2. In the action upon the covenant of seisin, for the purpose of ascertaining the measure of damages, the true consideration, and the fact that only part of it has been paid, may be shown by parol; although the deed expresses a different consideration, and acknowledges that the whole of it has been paid; and there is therefore no occasion, in such a case, to resort to a court of equity for relief. *Bingham v. Weiderwaz*, 509

See CONTRACT, 1, 2.

PARTIES TO ACTIONS.

1. A person, who is charged with fraudulently procuring the execution of a will in favor of an infant, is a proper party to a bill filed for the purpose of setting aside such will, although he has no interest. He may be charged with the costs. *Brady v. McCosker*, 214
2. The party who stakes a sum of money on an illegal wager, may recover so

much thereof as belongs to himself without joining in the action other persons who contributed specific portions of the fund. *Ruckman v. Pitcher*, 392

See INSURANCE, 4.
NON-IMPRISONMENT ACT, 4.

PARTITION.

See PLEADINGS IN EQUITY.

PAYMENT.

See EVIDENCE, 4, 5.

PENALTIES AND FORFEITURES.

See LIMITATION OF ACTIONS.
WITNESS, 2, 3.

PLEADINGS.

The form of an action is determined by the matter set forth in the declaration, and not by the name which the plaintiff may give it. If, therefore, the pleader, in the commencement of a declaration, gives the action a wrong name, it will do no harm. *Cornes v. Harris*, 223

See BANKRUPTCY, 5.
NUISANCE.

PLEADINGS IN EQUITY.

The complainant claimed half of the estate by inheritance from his father, and the other half by inheritance from his brother, and alleged that the will of his brother was void for fraud, &c.; but in case the will should be adjudged valid, then he still claimed one-half of the estate, and insisted that he was entitled to a partition; and the prayer of the bill was, that the will might be declared void, or that a partition might be had; *held*, that the bill did not make a case of partition, and therefore that it was not liable to objection for multifariousness. *Brady v. McCosker*, 214

See CHANCERY.
JURISDICTION OF CHANCERY, 5.

PLEDGE.

1. The judgment of the supreme court, determining that a sheriff holding an execution against a pledgor, may by virtue thereof take the property pledged out of the hands of the pledgee into his own possession, and sell the right and interest of the pledgor therein, affirmed, the judges being equally divided upon the question. *Stief v. Hart*, 20
2. After a sale by the officer in such a case, the pledgee is entitled to the possession of the property until the purchaser redeems it from the pledge. *id*

POLICY.

See INSURANCE.

POSTMASTER.

A postmaster who assumes to charge letter postage on a newspaper in consequence of an initial being on the wrapper, does not act judicially in such a sense as to protect him from an action for improperly detaining such newspaper, although no fraud or malice be alleged or proved. *Teall v. Felton*, 537

POWER.

1. A testator, by his last will and testament, appointed three persons his executors, and authorized them, or the survivor of them, to sell and convey any part of his real estate, "in case they should find it proper or most fit in their opinion," to sell the same for the purpose of paying his debts. Two of the executors neglected to qualify, and never acted as such. The other executor duly qualified, and took out letters testamentary in his own name only, and subsequently sold and conveyed a portion of the testator's real estate for the purpose specified in the will; held, that the power contained in the will was well executed, and that the conveyance was valid. *Taylor v. Morris*, 341
2. It seems, that the statute, (2 R. S. 109, § 55,) which provides, that, where real estate is devised to executors to be

sold by them, or is ordered by any last will to be sold by them, and any of the executors neglect or refuse to qualify and act as such, the sale may be made by the executor or executors who take upon themselves the execution of the will, applies as well to *discretionary* as to *peremptory* powers of sale. *id*

POWER AND AUTHORITY.

See JURISDICTION, 3, 4, 5.

SALE FOR TAXES AND ASSESSMENTS.
STATUTES.

PRACTICE.

1. It is irregular to serve an assignment of errors before one has been filed; and where the assignment was not filed until the next day after it was served, the rule to join in error and all subsequent proceedings set aside. *Lyme v. Ward*, 531
2. Where the judgment of the court below is reversed by default in not joining in error, the remittitur should not be sent to the court below until ten days have elapsed. *id*
3. Motion papers should be entitled in this court, notwithstanding § 274 of the code declaring that "the title of the action shall not be changed in consequence of an appeal." Papers not so entitled cannot be read. *Clickman v. Clickman*, 611

See APPEAL.

ATTORNEY.

COSTS.

DEFAULT.

JURISDICTION, 1, 2.

REHEARING.

SPECIAL VERDICT.

PRESUMPTION.

See EVIDENCE, 4, 5.

PRIMARY FUND.

See MORTGAGE, 6.

PRINCIPAL AND AGENT.

See AGENT.
INSURANCE, 1, 2.
MORTGAGE, 3, 4.
OFFICE AND OFFICER, 4.

PRIORITY.

See ASSIGNMENT.
NON-IMPRISONMENT ACT.

PRIVILEGE OF WITNESS.

See WITNESS.

PROCESS.

See JURISDICTION, 3, 4, 5.

PROOF AND ACKNOWLEDGMENT
OF WRITTEN INSTRUMENTS.

See EVIDENCE, 1, 2.

PROPERTY.

Where A. occupied land under H., and by the terms of their agreement the grass belonged to A.; *held*, that A. might transfer such grass, while yet growing, by a personal mortgage.
Jencks v. Smith, 90

See FIXTURES.

PROTEST AND NOTICE.

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 7, 8, 9, 10, 13, 14, 15, 16, 17.

R

RACING.

See BETTING AND GAMING, 3.

RATIFICATION.

See AGENT.
MORTGAGE, 3, 4.
OFFICE AND OFFICER, 4.

RECOUPMENT.

See FRAUD, 5.

REHEARING.

A party complaining of any order made at a special term has a *right* to have the matter reheard and passed upon by the supreme court, at a general term. *Gracie v. Freeland*, 223

REMAINDER.

See ESTATES TAIL.

REMITTITUR.

See JURISDICTION, 1, 2.
PRACTICE, 2.

REPLEVIN.

1. After a sheriff had levied upon property which belonged to the defendant in the execution, another person brought replevin, and had the same property delivered to him upon the writ, and died pending the action; *held*, that the sheriff might retake the property and sell it to satisfy the execution. *Burke v. Luce*, 163
2. On the death of a plaintiff in replevin the action abates and cannot be revived by *scire facias*. *id*
3. In such a case the defendant has no remedy upon the replevin bond. *id*

RESCISSION OF CONTRACT.

See FRAUD, 4, 5.

RESERVATION.

See DEED, 3, 4, 5, 6, 7.

RES JUDICATA.

See INDICTMENT, 4.

REVIVOR AND SUPPLEMENT,
BILL OF.

See CHANCERY.

S

SALES.

See FRAUDS, STATUTE OF.

SALE FOR TAXES AND ASSESSMENTS.

1. Where three persons were authorized to estimate the expense of a public improvement in the city of New-York, and to assess the same upon the owners and occupants benefited, and one of the three persons was not consulted and did not act in making such estimate and assessment; *held*, that the proceeding was void, and that no title could be deduced through a sale made for the non-payment of such assessment. *Doughty v. Hope*, 79
2. Where an assessment is signed by two of the persons so authorized, it seems the legal presumption is, that the third was present and acted in the business; but it may nevertheless be shown that he was not consulted and did not act. *id*
3. One of the assessors who signed the certificate is a competent witness to prove that the third assessor was not consulted. *id*
4. The ratification by the common council of the city of New-York, of a void assessment, does not aid the proceeding. To make out a title there must be a valid assessment duly ratified. *id*
5. The publication of the redemption notice required by *Stat. 1816, p. 114, § 2, as amended by Stat. 1840, p. 274, § 10*, after a sale for a tax or assessment, must be fully completed before the commencement of the last six months of the two years succeeding the sale, and an omission in this respect will invalidate the purchaser's title. *id*
6. Where the redemption notice is not published according to law, a regular notice served after the execution of the lease given upon the sale, pursuant to *Stat. 1841, p. 211, § 3*, and the certificate by the street commissioner, required by § 7 of the same act, do not confirm the title. *id*
7. The statute which declares that the lease given upon a sale for taxes or

assessments in the city of New-York "shall be conclusive evidence that the sale was regular," &c. (*Stat. 1816, p. 115, § 2.*) refers only to the notice of sale, and the proceedings at the auction. *id*

SCIENTER.

See ANIMALS.

SCIRE FACIAS.

See ABATEMENT.

SEISIN.

See COVENANT.
ESTATES TAIL, 3.

SHERIFF.

See INDEMNITY, 4.
OFFICE AND OFFICER, 1, 2, 3.

SLANDER.

In an action for slander it is not competent for the plaintiff to introduce evidence of his good character in reply to evidence introduced by the defendant tending to prove the truth of the charge. *Houghtaling v. Kilderhouse*, 530

SPECIAL VERDICT.

1. A special verdict should state facts and not merely the evidence of facts, so as to refer to the court only the consideration of questions of law. *Hill v. Covel*, 522
2. To authorize a judgment for the plaintiff upon a special verdict in an action of trover, the verdict should either find a conversion of the property, or state such facts as to leave the question of conversion one of law merely. *id*
3. A demand and refusal are only evidence of conversion, and may be repelled by proof showing that a compliance with the demand was impossible. *id*

4. Therefore, where in trover the special verdict stated a demand and refusal, but did not show that the property was in the possession of the defendants at the time of such demand, there being also other evidence stated in the verdict tending to show that the property was not then in their possession; *held*, not sufficient to entitle the plaintiff to judgment on the verdict, *id*

5. And although the special verdict also found that the defendants had sold the property, yet it appearing that they had authority to sell it on account of the plaintiff, and the fact not being negatived that the sale was for the purpose and in the manner authorized; *held*, that the court could not adjudge that there had been a conversion. *id*

STAKEHOLDER.

See BETTING AND GAMING, 1.

STATUTES.

1. Whenever a power is given by statute, every thing necessary to make it effectual, or requisite to attain the end in view, is implied. *Per* JEWETT, C. J. *Stief v. Hart*, 20

2. So when the law commands a thing to be done, it impliedly authorizes the performance of all acts necessary to the execution of the command. *Per* JEWETT, C. J. *id*

3. Where property is taken under a statute authority, without the consent of the owner, the power must be strictly followed; and if any material link is wanting, the whole proceeding is void. *Doughty v. Hope*, 79

See CONSTITUTIONAL LAW.

EVIDENCE, 7.

LIMITATION OF ACTIONS.

NON-IMPRISONMENT ACT.

SALE FOR TAXES AND ASSESSMENTS.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STOCKHOLDER.

See CORPORATIONS, 1.

LIMITATION OF ACTIONS, 1, 2.

SUBROGATION.

1. One who pays a debt for which he is not personally bound, and which is not a charge upon his property, is not entitled to be subrogated to a lien which the creditor had upon the estate of the debtor. *Wilkes v. Harper*, 586

2. The right of a surety to be subrogated, on payment of the debt, to the securities held by the creditor, does not depend upon contract, but rests upon principles of justice and equity. *Matthews v. Alkin*, 595

3. A. owed a debt to B., who was indebted to C. At the request of B. and in pursuance of an arrangement between B. and C., A. executed a bond and mortgage for the amount of his debt, directly to C. The complainant D., on the solicitation of B., but without any request from the mortgagor, guaranteed the payment of the bond. The holder of the bond and mortgage, who had also become the owner of the equity of redemption under a junior mortgage, sued D. upon his guaranty and compelled him to pay the debt. *Held*, on bill filed by D., that he was entitled by substitution to the benefit of the mortgage for his indemnity. *id*

See ASSIGNMENT.

EXECUTOR, 3.

SUBSCRIPTION.

See CONTRACT, 3, 4, 5.

SUMMARY PROCEEDINGS.

See LANDLORD AND TENANT, 4.

SUPPLEMENTAL BILL.

See CHANCERY.

SURETY.

See JURISDICTION OF CHANCERY, 7.
LEGACY AND LEGATEE, 6.
SUBROGATION.
USURY.

SURROGATE.

See EXECUTORS, 1.

T

TRESPASS.

See ANIMALS.

TRIAL.

1. A request for instruction to a jury should rest upon undisputed facts or a hypothetical case; and if the proposition which the party submits be not right in all its parts, both as to fact and law, the judge may refuse to give the instruction asked for, and need not qualify such refusal by pointing out the good and the bad parts of the proposition. *Doughty v. Hope*, 79
2. Where a witness objected to testifying on the ground that his testimony might subject him to an indictment, or prosecution for a penalty, it is not, in a court of review, an answer to the claim of privilege, that the statute of limitations has run against the offence, unless it appear that such answer was suggested on the trial. *Per BRONSON, J. Pierce v. Bank of Salina*, 83
3. Where upon a trial there is opportunity for objection, and the party whose duty it is to object, remains silent, all reasonable intendments will be made, in a court of review, to uphold the judgment. *Jencks v. Smith*, 90

See BILL OF EXCEPTIONS.

COURT OF A JUSTICE OF THE PEACE.
ERROR.
EVIDENCE, 9, 10.
JUROR.

TROVER.

1. A demand and refusal are only evidence of conversion, and may be re-

pelled by proof showing that a compliance with the demand was impossible. *Hill v. Covell*, 522.

2. Therefore, where in trover the special verdict stated a demand and refusal, but did not show that the property was in the possession of the defendants at the time of such demand, there being also other evidence stated in the verdict tending to show that the property was not then in their possession; *held*, not sufficient to entitle the plaintiff to judgment on the verdict. *id*

See JURISDICTION, 7.

SPECIAL VERDICT, 1, 2, 5.

TRUST.

See EXECUTORS, 1, 2.

U

UNDERTAKING.

See APPEAL, 15, 16, 23, 24.

UNITED STATES, PRIORITY OF.

See ASSIGNMENT.

USURY.

1. *Per BRONSON, J. and JEWETT, C. J.*, an agreement made by a creditor with the principal debtor, to forbear the payment of the debt in consideration of a usurious premium paid for such forbearance, is void, and therefore cannot operate to discharge the sureties. *Vilas v. Jones*, 274
2. Whether a mere surety is a borrower, within the meaning of the usury act of 1837, (*Laws of 1837, p. 487, § 4.*) *quere. id*

See JURISDICTION OF CHANCERY, 6, 7.
WITNESS, 1, 2.

V

VERDICT.

See SPECIAL VERDICT.

VOLUNTARY PAYMENT.

See SUBROGATION, 1.

W

WAGER.

See BETTING AND GAMING.

WAIVER.

See BILL OF EXCEPTIONS.

COURT OF A JUSTICE OF THE PEACE.
ERROR, 2.

EVIDENCE, 9, 10.

FRAUD, 4, 5.

WARRANT.

See JURISDICTION, 3, 4, 5.

WILL.

1. Where, by a will made prior to the revised statutes, lands are devised in general terms without words of limitation or inheritance, the devisee takes a life estate only. *Harvey v. Olmsted*, 483

2. And such introductory words as these: "I order and direct my real and personal estate to be divided and distributed as follows." do not enlarge the devise into a fee. *id*

3. A charge, to carry a fee by implication, where the devise is without words of limitation, *must be upon the person of the devisee in respect to the lands devised*. Where this exists, it gives to the devise the character of a purchase. *id*

4. A testator, by his will made in 1821, gave a part of his real estate to his wife during her widowhood, and after her decease to two of his children. To his son Nathaniel he gave two parcels, one designated in the will as the Powers lot, the other as the *mountain lot*. To another son he gave a legacy of \$1000 to be paid out of his personal estate, if sufficient after paying debts and other legacies, but if not sufficient, then

to be paid in land "from the Powers lot, so called." There were no words of inheritance in any part of the will. Introductory to all the devises and bequests were these words: "I order and direct my real and personal estate to be divided and distributed as follows." In the concluding part the testator declared, that in case any dispute should arise upon the will, the same should be referred to three men, to be chosen for that purpose, who should "declare their sense of the testator's intentions unfettered by law and the niceties of legal construction." *Held*, that Nathaniel took only a life estate in the mountain lot. *id*

See EXECUTORS, 1, 2.

JURISDICTION OF CHANCERY, 1, 2,
3, 4, 5.

LEGACY AND LEGATEE, 1, 2, 3, 4, 5.
POWER.

WITNESS.

1. A plaintiff on the record, or plaintiff in interest, when called upon to testify under the usury act of 1837, cannot be compelled to disclose facts tending to show that the promissory note, to recover which the suit is brought, was discounted by him in violation of the statute (1 R. S. 595, § 28) concerning the discounting of notes, &c., by officers and agents of banking corporations. *Pierce v. Bank of Sakina*, 83

2. A note discounted by the teller of a bank, for his own benefit, in violation of the statute above cited, is void; and where the note alleged to have been so discounted was in suit for his benefit, and in opening the defence to the jury, this was stated as one ground of defence, and usury as another ground, such teller, although ostensibly called as a witness to prove the usury, cannot be required to disclose the transaction for the reason that his testimony might subject him to a loss of the note upon a ground distinct from the defence of usury. *id*

3. A witness, or party called as a witness, may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a

series of facts which together would expose him to such penalty or forfeiture.

id

4. A witness is privileged from answering a question when the answer would tend to disgrace him, unless the evidence would bear directly upon the

issue; and therefore, where the answer could have no effect upon the case, except as it might impair the credibility of the witness, *held*, that he was privileged. *Lohman v. The People*,

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See EVIDENCE, 6.

END OF VOLUME ONE

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